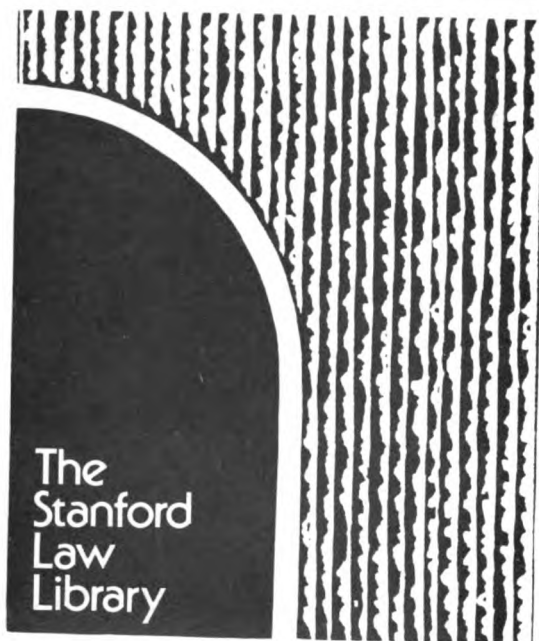

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Fred. W. Gale
1840

A

GENERAL ABRIDGMENT

AND

DIGEST OF AMERICAN LAW,

WITH OCCASIONAL

Notes and Comments.

BY NATHAN DANE, LL. D.

COUNSELLOR AT LAW.

IN EIGHT VOLUMES.

VOL. IV.

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Jud. W. Gale
1840

A

General Abridgment
OF
AMERICAN LAW.

CHAPTER CIV.

COVENANTS TO CONVEY LANDS.

ART. 1. GENERAL PRINCIPLES. § 1. By this act all covenants and contracts to convey lands, must be under seal, in order to have an actual conveyance after the decease of the party contracting; hence it is always best to have all contracts to convey lands, and all rights and interest in them, under seal. Contracts, agreements, and covenants to convey lands, or real estates, and rights, and interests in them, must, in the nature of things, be very numerous and very various; and necessarily involve in them a variety of principles, some of which require very close attention.

*Mass. Act,
March 1784,
see below,
Ch. 108, a. 6.*

§ 2. On proper attention to the subject, it will be found, that all our covenants relating to lands are so connected with, and dependent upon, the conveyances of them, and the power and right in the party to convey, that all these, to be understood, must be examined and considered together. And it will also be found, that actions and pleadings on covenants, relating to lands, involve almost every inquiry into titles to lands so far at least as they depend upon contracts. And to know when and how an action is to be brought, and in what form, how to be defended, and by what means it is barred, generally requires a very accurate understanding of the whole body of land actions and land laws.

§ 3. An action may lie against a person on his contract to convey: 1. Because he has contracted to convey lands, and by law cannot, though willing to do it, as where he has no

Чл. 104. *seizin*, but another is adversely seized, without title, or having title : 2. Because he has contracted to convey, and neglects or refuses to do it, though he is able to convey : 3. Because he has contracted to convey in a particular form, and the law does not allow him to convey in that form, but in some other : 4. Because he has contracted further to assure as a part of the conveyance, and fails in this from neglect, refusal, or inability in law to perform. Where A covenants to convey lands to B, and B takes possession by A's consent, as B's possession is lawful, ejectment will not lie against him without a demand of possession, and refusal to quit, unless on possession taken he agreed to quit if he should not pay the purchase money at the day appointed &c., the agreement is as a clause of re-entry in a lease. *Right v. Beard*, 13 East, 210 ; *Hegan v. Johnson*, 2 Taun. 148 ; 1 Starkie, 308.

§ 4. So an action of covenant may lie against one because the covenant runs with the land. So it may lie against two or more persons, or one only, because joint and several. So against one who covenants he is seized, when he is not ; or that he has a right to convey, when he has not ; or that the land is free of incumbrances, when it is not so ; or that he will warrant and defend, when he does not or cannot ; so for not repairing, not paying rent, &c. &c.

Properly to understand the right of action, and of defence, in these and other cases in which this action of covenant may lie, or, in other words, *good pleading* on these subjects, it is proper to attend to the things intended to be conveyed ; the rights and interests intended to be secured to the covenantee ; the capacities, in law, of the parties ; to the modes and forms of conveyance, and to the forms of the contracts entered into.

§ 5. In all these respects different nations have materially differed ; and, frequently, the same nation at different periods of time. The principles of *feudal seizin*, so important and essential part of land titles, among those who adopted the feudal system, have scarcely been known to, or thought of, by many other nations. And a conveyance by *feoffment* and *livery of seizin*, once so very common in England, is now hardly known in practice.

§ 6. In considering this covenant, and the conveyances and contracts to convey in which it has place in this State, and sometimes in other States, only the grounds and principles of them, and not the details, can be considered.

§ 7. In the first part of this work, the origin and nature of contracts, as well as the matter and execution of them, and the privies in estate &c., and capacities of parties to them, have been briefly noticed. Hence less is necessary to be said in this place. So the principles of covenants, the incapaciti-

ties of married women, idiots, infants, and persons *non compos mentis*, have been already considered in the preceding chapters. 15 Mass. R. 500. A covenants to convey lands to B, on his paying a certain sum in four years. B covenants to purchase them, and pay in four years, and interest annually. A may have covenant for the annual interest for the three first years, but not for the fourth, nor principal, without tendering a conveyance; both to perform at the same time. Gardner, admr. v. Carson, 16 Johns. R. 267.

CH. 104.
Art. 1.

§ 8. In this case the court held, that when one is bound to make a conveyance by deed, he must shew the deed *verbatim*; in order that the court may judge of it, if it have legal words, and be a proper deed without erasures and interlineations in the material parts of it. 2 Salk. 498, Armit v. Bream.

§ 9. And so in every case when a man contracts to convey lands or real estate, by deed, by fine or common recovery, by lease and release, or in any other mode of conveyance, recognized by the laws of the land, he must shew how he has done it, that the court may judge whether he has fulfilled his contract or not.

§ 10. It has been objected that the English statutes of *mortmain* have been adopted here, by reason of which there can be no conveyance to corporations, without a license to purchase or take in *mortmain*, given by the legislatures or otherwise. But it has been answered, and very properly, that these statutes have never been adopted here, at least in New England. Though our ancestors extracted from them two principles: on one, they invariably rejected donations to superstitious purposes; on the other, as invariably allowed those to charitable uses, especially for the encouragement of schools. Even in England, a gift or conveyance to a corporation, without license, and so in *mortmain*, barred the heir of the giver or grantor; hence it operated as a conveyance, as to the heir, giver, or grantor. These statutes then were originally grounded altogether on feudal principles; and their object was to preserve to the lord his reversionary interest, and to the king his ultimate reversion or fee, and the feudal military services, which they had in the estates of individuals, which were lost by the king or lord, when estates were given or conveyed in *mortmain*, or to corporations, which could not be attained, and which, in contemplation of law, could never die. Hence the king's licenses, in *mortmain*, were made necessary to the validity of such gifts or conveyances, in order to prevent such losses without his consent. And the established doctrine was, that such gifts, without his license, were a forfeiture of the estates so given or conveyed to the lord or king, as the case might be; and whenever such were made, and operated as it 2 Bl. Com. 268, 269, 270, 273.—Magna Charta, 9 H. III. 36.—1 Co. 96.—28 H. VIII.—9 Geo. II, c. 36.—1 Salk. 162, the King v. Portington.—4 Wood's Con. 155.

Сн. 104. respected the heir, the question was only between the donee, Art. 2. the corporation, and the king or lord. The 43 El. c. 4, in a special manner, made the true distinction, in forbidding gifts to superstitious, and allowing those to charitable uses, and the latter without royal licenses in *mortmain*, and for good reasons. The king having the ultimate fee of every individual's estate, and losing this by vesting such estate in a corporation, he had a direct interest in denying his license to every gift or conveyance in *mortmain*, however beneficial it might be to the public; and it was, in fact, to put all charitable donations in his power and controul, to make his licenses, in *mortmain*, necessary. This statute, in principle, was adopted by our ancestors here. This act of the 43 El. expressly recognized "free schools," and "schools of learning," as fit objects of good and charitable donations. The king's charters to establish these charitable corporations were almost of course, and the court of chancery had power to make such donations answer such purposes in the most beneficial manner.

ART. 2. *What interests in lands &c. may be conveyed.*

§ 1. It is a general rule that a man may convey whatever he actually or potentially has, as has been already stated in the first chapter, a. 5 &c., but not a mere possibility. Nor can he convey lands whereof he is disseized, though he have the right of property, and also the right of possession, for reasons that will be stated in a subsequent article. See 6 Cruise, 523, &c.

§ 2. In feudal times, in England, lands could not be conveyed, but by solemn livery of seizin, made upon, or within view, of the land conveyed, except in a few cases. Hence the statute of the 27 of H. VIII., c. 10, recited, "that by common law, lands, tenements, and hereditaments, be not devisable by testament, nor ought to be transferred from one to another, but by solemn livery and seizin, matter of record, writing sufficiently made, *bonâ fide*, without covin or fraud;" and condemning *uses*, as they had existed, and other contrivances to evade the common law; annexed the *possession* to the *use*, and turned the use into a legal estate.

2 Bl. Com. 57,
287, 288, 290.

§ 3. By feudal law, a feud could not be transferred without the consent of the lord, nor could it be devised; nor could the feudatory charge his lands with his debts; nor could he alien, even with the lord's consent, unless he obtained the consent of the heir apparent, or presumptive; nor could the lord transfer his seigniorship without the consent of his vassal, or his attornment. "But by degrees this feudal severity is worn off; and experience has shewn, that property best answers the purposes of civil life, especially in commercial countries, where its transfer and circulation are totally free and unre-

strained." "But now a man may sell all his lands, pawn them, devise them, &c.; and by 4 and 5 of Anne, attornments are no longer necessary." CH. 104.
Art 2.

§ 4. *Interest of the grantor.* Regularly no man can convey, but he who has an existing interest in the lands. Strictly speaking, lands being immovable never can be conveyed, transferred, handed, or delivered over from man to man, in the sense a hat, a horse, or other moveable thing is. Still, in the eye of the law, land passes from the grantor to the grantee. In fact the grantor relinquishes his right and possession, consents the grantee have them, and he assumes the right, and takes possession, by entering on the land as his own. This is the substance, whatever may be the form, of conveyance. And it is equally clear, that no man can release or relinquish a right, but he who has an existing, or at least a possible or contingent right, at the time; and if he covenants to do either, without having this interest or right, he instantly is unable to perform, breaks his covenant, and an action lies against him.

§ 5. *Existing interest in lands.* When one conveys, or is about to convey lands, it is in general material for him to consider his existing interest in them, as well as it respects his capacity to convey at all, as the form of conveyance.

§ 6. The mortgagor while in possession, by consent of the mortgagee, as also the mortgagee, may convey, and so covenant to convey; for each has an existing interest in the land of a nature to be considered in a future chapter. 2 Salk. 563,
Hammond v.
Wood.

§ 7. So if A make a lease to B "to commence in two years, that after the two years are expired, B, before any entry, may grant his term, although the lessor doth continue in possession;" for when B's term is commenced, he has a transferrable interest before entry." Cro. El. 127,
Wheeler v.
Thorogood.
Saffin's case,
1 Cru. 249.

§ 8. So if A lease for years to B, to commence after an estate for life, or the termination of a lease for years in being, and a stranger, after the death of the tenant for life or the end of the lease, enter by tort, yet B may grant over his term. But if B had entered into the land, and had been afterwards put out, he could not grant his term till he had entered; for till he enters he has but an *interesse termini*, which is grantable over, and cannot by disseizin or feoffment be divested and put to a right, any more than rent may be, or common by the disseizor or the lessor; but after entry and ouster the case is otherwise. Cro El. 15,
Bruerton v.
Rainsford,
cited 1 Cru.
249.—1 Co.
124.—5 Co.
124, in Saf-
fin's case.

§ 9. So one who is entitled to trees, emblements, or grass standing, has such an existing interest in them that he may grant or convey them. So in regard to reversions or remainders, they may be granted or conveyed in fee, in tail, for life or years, if vested and not contingent; so rents not suspended. 5 Wood's
Con. 21.—
Bro. 10.
2 Bl. Com.
290.

CH. 104. And if A be a tenant for life of two houses, he may grant the
 Art. 2. reversion of one of them.

2 Bl. Com.
 290.

§ 10. But if a man has only the right in him, either of possession or of property, he cannot convey it to another, lest pretended titles be purchased up, and thereby lawsuits be promoted. For if a bare right of property or possession could be conveyed or transferred, men fond of speculating in lawsuits would no doubt buy them up for small sums and bring many vexatious actions; therefore, the law has wisely forbidden such conveyances, though it as wisely allows such rights to be released to those in possession, because then they are extinguished and are not the grounds of actions.

Lit. sect. 347.
 —Co. L. 266.
 —2 Bl. Com.
 290

§ 11. And a mere right of action can no more be bought up in the United States, than in England, nor can a mere right of entry be granted or transferred.

5 Wood's
 Con. 21, 22.—
 1 W. Bl. 225,
 226, &c.—
 2 Fearn, e.
 513, Selwyn
 v. Selwyn.—
 2 Burr. 1131.
 —4 Mass. R.
 690, Quarles
 v. Quarles.—
 8 Mass. R.
 143, Kenny
 v. Tucker.

§ 12. *A possible or contingent interest is not assignable :*

1. There is a bare possibility, as the mere hope of an heir of succession, this clearly cannot be granted or conveyed; but if the heir dispose of it, living his ancestor, it is clearly void, though the estate afterwards come to him; nor has such heir any interest he can release, at most he can only be estopped by his warranty; not because he can convey any interest, but because he is rebutted to claim against his own warranty. However, such heir may receive property in advance of his ancestor, in full of his part in his estate, and by his deed bar himself of any future claim, or claim after the death of his ancestor. So a woman before marriage, though expecting to marry a man, has not even this hope; hence, the 27th H. VIII. created a jointure in order to bar her of dower by special statute provision. Ch. 125, a. 5, s. 35.

3 D. & E. 88,
 98, Jones v.
 Roe, and
 cases cited.—
 1 W. Bl. 222,
 251.—1 H. Bl.
 30, Roe v.
 Jones.

§ 13. 2d. *A possibility or contingency coupled with an interest.* “These are now considered as descendible, releasable, assignable, and devisable in the same manner as vested interests.” As a devise to A, till B arrive to the age of twenty-one years, B has a devisable or assignable interest. Willes, 211, 214.

1 Wils. 211,
 Morrough v.
 Comyns.

§ 14. So a share in a prize captured may be assigned or conveyed before condemnation; and after the prize is sold, the purchaser may have an action for money had and received to his use against the prize-agent who holds the monies, for when the prize is condemned “the property must be considered as immediately vested at the instant the ship is taken.”

Co. L. 46.—
 6 Cruise, 523.

§ 15. A mere possibility cannot be assigned or conveyed; as if a lease be made to husband and wife for life, remainder to the executors of the survivor for years, this is a bare possibility, and not in the husband's disposal, for the wife may survive.

§ 16. But if A grant 600 cords of wood out of his wood-land to B, to be taken where A shall assign, and A will not assign it, B on request may take it : and if the *locus in quo* be not assigned away, B has a grantable interest, and not a mere possibility or right of action ; for the wood is granted, though not designated.

CH. 104.

Art. 2.

5 Co. 25,
Palmer's
case.

§ 17. *But a right may be extinguished by a release to the tenant of the land, though only a naked right ;* as this operation rather prevents than promotes lawsuits. Hence, many kind of rights may be released to one in possession, that cannot be assigned or conveyed. The conveyance operates to sell or transfer a right of action, a thing odious in the eye of the law, and not allowed ; but this release only extinguishes and annihilates the right of action, a thing the law favours, as it lessens the causes of litigation. As where A had a term for 5000 years, and devised it to B for his life, remainder to C : and the court held, that C had a possibility, he could release to the tertenant, as to B in possession ; for it was a *potentia propinqua*, an interest that probably would vest ; also, that C might convey his interest by joining with B ; that “ the release of C extinguished his future interest,” for several reasons stated in the case. But the releasee must have such an estate as that the contingent interest of the releasor may merge in it. Hence, if the releasee have only a chattel and the releasor a freehold, his release is inoperative, for a freehold cannot merge in a chattel. One reason given was, that C had only a chattel interest.

10 Co. 46 to
53, Lampet's
case.—8 Co.
95.—1 Burr.
282.

§ 18. One by mere release may convey his right of property to one in possession ; but “ if a man has only in him the right either of possession or property, he cannot convey it to any other.” And Co. Lit. 266. “ By common law no charter, sale, or gift will be good, if the donor at the time of the contract be not seized of two rights, viz : the right of possession and the right of property.”

2 Bl. Com.
325, 290.

§ 19. This was an action of covenant broken on a covenant of the deft., whereby for a valuable consideration he covenanted, that if he survived Tuthill Hubbard he would pay over and convey to the plt., his heirs, &c. one third of the estate, real and personal, that might descend to the deft. from the said Tuthill as an heir to him. Def't. survived said Tuthill. Held, this covenant was a fraud on this ancestor, and void in law and equity, and productive of public mischief &c. This was decided on a motion in arrest of judgment, the contract being a part of the record after a verdict found for the plt. Said Tuthill knew nothing of the covenant.

7 Mass. R.
112, Boynton
v. Hubbard.

§ 20. How covenants to convey bind the land, heir of the

New. on Con.
34.—Hob.

203, Cavendish v. Worsey.

CH. 104.
Art. 2.




New. on Con.
35, 36, 37.—
2 P. W. 222,
Coventry v.
Coventry.—
1 Stra. 596 to
605, the same
case.—2 P.
W. 228.—
4 Bro. C. C.
466, and 1
Stra. 604, Al-
ford v. Alford.
—2 Eq. Ca.
Abr. 659.—
4 Bro. C. C.
462.—New.
on Con. 38,
39, 40.

New on Con.
263, 274.—
2 Vern. 558.
Lechmere v.
Carlisle.—
3 Atk. 322,
Deacon v.
Smith.—3 P.
W. 227.
Sowdon v.
Sowdon.
Blandy v.
Wedmore.—
3 Atk. 419,
Lee v. D'
Aranda.—10
Ves. 1.—
3 Atk. 420.—
Wilcocks v.
Wilcocks,
2 Vern. 558.

covenantor in equity, and the remainder-man &c. When one covenants to convey land, and dies before execution, it is considered in equity as conveyed, and the covenantor as trustee for the covenantee, and the covenantor's heir compellable to convey; but not if heir in tail, as then he holds *per formam doni*. Powel v. Powel, Eq. Ca. Abr. 265; 1 Ch. Ca. 171; 1 Lev. 239.

§ 21. *A remainder-man bound to convey.* As where land was limited to A for life by deed &c. and he is empowered to charge the land with a jointure to his wife, or children's portions, an agreement by him to do either pursuant to the power, will bind him in remainder, and he was decreed to convey. Parker v. Parker, a like case in principle, cited 1 Stra. 604; also, Holingshead v. Roingehead, Id. In this last case a minor contracted to execute a power; and held good, as a minor may do, though he cannot contract to affect his own estate *proprio vigore*. Nor need the tenant for life expressly refer to the power to convey &c., and if limited to him in possession, his covenant before he is in possession is good, as evidence he meant to do the act when he came into possession. Jackson v. Jackson, Gilb. R. 166; 1 Vern. 406. Like case binding the remainder-man to convey, Shannon v. Bradstreet; this was a power to tenant for life to make leases, and he agreed to make one to the plt. and died.

§ 22. *Performance in equity of covenant to convey, settle, &c.* It is now settled, that if a person covenant to purchase and settle lands, or to convey and settle lands, or to pay monies to trustees to be vested in lands to be settled, he performs his covenant if he purchase lands and lets them descend of equal or greater value, and if of less value, part performance according to their value. This kind of performance some call a *satisfaction*; 10 Vesey, 9, 511; but it must appear the person meant to satisfy his covenant. A like construction where covenants respect personal estates. 1 P. W. 323. As where the husband covenanted to leave his wife surviving £620, and he left a distributory share of a larger amount; held, a performance or satisfaction of his covenant; like principle if he covenant to leave his wife a certain part of his estate. 1 Ves. 519, Barret v. Beckford, satisfaction or performance. But there may be words in the covenant that will vary this principle, hence not a performance; and had said distributory share been less than the property secured by the covenant, it had been performance *pro tanto*. 10 Ves. jr. 9, Garthshore v. Challic; 1 Bro. —; 10 Ves. jr. 519; Gardner v. Ld. Townsend, Coop. 301; Davys v. Howard, 5 Bro. C. C. 552; Lewis v. Hill, 1 Ves. 274.

§ 23. *Satisfaction in equity of covenants to convey &c.* See **CH. 104.**
Legacies, ch. 43, especially art. 14, *Ademption, Satisfaction,*
&c. New. on Con. 275 to 295. 

1st. On this subject of performance or satisfaction of covenants and contracts to convey to, or to settle property on another, if a question arise, whether the property conveyed, settled, devised, or left to him, or in his power to obtain, is as valuable and beneficial as that contracted to be conveyed, settled, and so a reasonable performance or satisfaction; the time to estimate their value &c. is at the time of the death of the covenantor, where no other time is fixed on. **Amb. 106, Pennel v. Hallet**

§ 24. The general doctrine of satisfaction of covenants and contracts, is where the contractor does some other act or thing in lieu of, and as equivalent to that contracted for. But in several cases Lord Hardwicke &c. have denominated *performance* and even *strict performance*, what other chancellors have denominated *satisfaction*; as in *Blandy v. Wedmore*, *Lee v. D'Aranda*, *Barret v. Buckford* above, &c.; so in *Prince v. Stebbing*, 12 Ves. 411. The court in these cases finding the contractor's intention to afford this equivalent, will not allow the contractee or his representatives both to take this equivalent, and also to have the contract enforced, but puts him to his election if he has one, or consider the contract performed as the case may be; and such intention may be implied,—as when A contracts a debt to B, and gives him a legacy as large or larger than the debt, this equity deems satisfying A's contract, so satisfying his debt to B, though in A's will he does not notice the debt, and so if the contractee or creditor be a wife; otherwise if the debt be contracted after the will is made, or the legacy is less than the debt. See 3 P. W. 354; 1 Salk. 508; 2 Vern. 478, *Athenson v. Webb*; *Moseley*, 295, *Minuel v. Sarazine*. Testator contracted a debt of £421 to B, and gave him a legacy of £400; equity held it no satisfaction even *pro tanto*. 2 P. W. 616. **3 P. W. 353, Fowler v. Fowler.—Pr. Ch. 240.**

§ 25. *Land devised of less value than covenanted for*, is a performance, in certain cases;—as if A contract for lands valued at £100 a year, and devise lands worth £88 a year, no satisfaction, except there is not estate enough left by A to pay the other charges on the land or those creditors who may come upon it. One sells land, then gets a title, he must confirm, but not his heir. 13 Ves. jr. 588; 15 Ves. jr. 60. **2 P. W. 616, Eastwood v. Vinke.—Morse v. Falkner. 10 Ves. 15.**

§ 26. *A covenant to purchase, convey, and settle may be executed in part*; hence a performance *pro tanto*, if the contractor buys and leaves to descend estate less in value than that contracted for, as it may be presumed he meant to continue purchasing; and a wife's taking a distributory share has the same effect as to her husband's covenant to provide for **Ch. 43, a. 13, s. 2.—1 Bro. C. C. 129, Haynes v. Mico.**

CH. 104. her ; but the legacy, if of a different nature, is no satisfaction
 Art. 2. for the debt or thing contracted for, or if the legacy appear to
 be intended as a bounty.

2 Atk. 300.—
 2 P. W. 552.
 —5 Ves. 519.

Pr. Ch. 240,
 Devise v.
 Poulet.

No satisfaction of the contract or covenant if the legacy be payable not so soon as the debt or annuity &c., or if *conditional* and the contract *absolute*, or the gift be an uncertain residue.

§ 27. *How the satisfaction must be as good and certain as the interest covenanted for*, see the last section. Also where a husband covenanted in marriage articles, if his wife should survive him, his executors &c. should, in nine months after his death, pay her £800 ; if issue, then the interest thereof for her life, and then the principal to be divided among the children. By his will he gave several specific legacies to her, and half his property to her absolutely ; he died without issue. Held, no satisfaction of the covenant.

1 Salk. 508,
 Ch. 43, a. 13,
 s. 3. several
 cases.—
 2 Vern. 555.
 Herne v.
 Herne.


§ 28. *How of the same nature*.—As if the husband contract to settle, or settle a jointure in *lands* on his wife, a *money* legacy is no satisfaction, and a residue in personal estate is added. 2 Eq. Ca. Abr. 218, ch. 43, a. 14, s. 2, several cases ; and 2 P. W. 616 ; Atk. 64 : but 1 P. W. 409 ; 2 Atk. 632. By condition or otherwise the contractor may imply he means his legacy &c. he gives shall be accepted in satisfaction of his contract, then it is so ; as the intention in giving it must govern. See ch. 43, a. 13, s. 2 ; 1 Atk. 427 ; 1 P. W. 146, Copeley v. Copeley ; 1 Bro. C. C. 309 ; 2 Vern. 255.

1 P. W. 146.
 2 Vent. 347,
 Blois v. Blois.
 —1 Bro. C. C.
 309, Byde v.
 Byde.—2 Ves.
 37, Allen v.
 Allen.—1 P.
 W. 146,
 Clarke v.
 Sewall.

§ 29. *Where a covenant &c. settles a portion*, it is more readily deemed satisfied than a debt, as neither law nor equity will readily allow double portions. Hence a legacy less than a portion may satisfy it, and though payable not quite so soon as the portion : but the objection to a double portion is merely among children, and those in equal degrees, not if to an only child &c. generally. So a legacy will be deemed satisfaction of a portion *pro tanto*, and the election of one, where equivalent, excludes the other. 2 Vern. 258 ; 1 Bro. C. C. 305. But to make the legacy a satisfaction of the portion, it must be commensurate to it.—As if a son by contract be entitled to £1500 to be invested in lands to his sole use after his father's death, a provision by will for his life is no satisfaction : but when a less legacy, and payable later, is, see *Jesson v. Jesson*, ch. 43, a. 14, s. 3, *pro tanto* ; or *in toto*, ch. 43, a. 13, s. 5, as to legacies.

2 Vern. 298,
 Goodfellow
 v. Burchett.
 —Ray v. Stan-
 hope, 2 Ch.

§ 30. *A portion by contract* is not satisfied by a provision not *ejusdem generis* with it ; or by one contingent, the portion being absolute. A portion in *money*, or the trust of a term secured by contract is not satisfied by a devise of *lands*. See 1 P. W. 345 ; 1 Bro. C. C. 425, 555. So if the contractor permit lands to descend, they do not satisfy a portion

secured by deed, or an annuity so secured. See 2 Atk. 458; CH. 104.
1 Atk. 426; 1 Bro. C. C. 295, see ch. 43, a. 13, s. 4, and 1 Art. 2.
P. W. 146, as to contingent equivalents, especially those on which no calculation can be made; as to the distinction between a debt and portion, see ch. 43, a. 13, s. 3 and 5, Tolson v. Collins, and Hencheliffe v. Hencheliffe. 

§ 31. *A presumption on the face of a contract or will in favour of a satisfaction of a debt or portion, is not repellable by matter dehors on general principle.* But to this rule there are exceptions, as 1 Ch. R. 106, Pile v. Pile. Parol evidence admitted to explain, as that a legacy given by a debtor to his creditor was in satisfaction of the debtor's contract. See Legacies. In other cases rejected, and properly;—as in case of a legacy to satisfy a covenant &c.; so in Copeley v. Copeley. As to parol evidence to rebut the testator's intention of ademption, see Ademption, ch. 43, a. 14; and if the covenant or contract afford an inference, parol evidence is not to be admitted against it, yet it may be to raise a mere question of election. New. on Con. 204, 206. 2 Vern. 593.
—Pr. Ch.
138.—2 Vern.
416.

§ 32. On A's covenant to convey or lease to B, his insolvency is a good objection to a specific performance, whenever B does not perform his part at the time, but *in future*, as pay rent &c. on the lease, from time to time, because equity sees there probably will not be a proper mutuality. In the case of a purchase, the vendee must tender payment when he claims a conveyance; hence his insolvency will not affect the case, *secus* in case of a lease and other cases which depend on his future ability. So if the lessor covenant to renew the lease, performance generally will not be compelled if the lessee become a bankrupt, yet in some special cases equity will enforce a specific performance of covenants in favour of his assignees. 3 Ves. 253, Brooke v. Hewitt; see Ch. 226, a. 5, s. 2, specially on terms. 8 Ves. 92,
Buckland v.
Hall.—6 Ves.
67, Board-
man v. Mos-
tyn.—1 Ch.
Ca. 71,
Drake's case.

§ 33. *Contract to convey &c. lands abroad.* Equity in England decrees a specific performance if the debt. be within its jurisdiction, for it acts on the conscience of the party living in England, is *in personam*. 1 Ves. jr. 385, Penn v. Lord Baltimore, as to the boundary between Pennsylvania and Maryland. See 10 Ves. 164, Jackson v. Petrie. New. on Con.
305, and cas-
es cited 1
Ves. 444.

§ 34. A party covenants or contracts to convey or do some other act on a penalty, equity will enforce, or relieve as the case may be; at law he has his election to do the act or pay the penalty. Equity does not allow this, if to do the act was the main object of the contract.—As if A, on marrying his daughter to the plt., contract on a penalty to settle real estate on them in tail, and neglect so to do, and the penalty is offered, equity enforces A's heir to settle the estate. Lord Hardwicke said, such penalties had never released the parties from New. on
Con. 307,
327.—2 P.
W. 191, Hob-
son v. Tre-
vor.—10 Mod.
615, Parks v.
Wilson.—2
Atk. 370.

CH. 104. their agreement. See 1 P. W. 104, *Collins v. Plummer*; *Telfair v. Telfair*, 2 Desaus. Ch. R. 271.

Art. 2.

1 Bro. C. C. 418, *Sloman v. Walter*.—
3 Ves. 879, *Moss v. Matthews*—*Filder v. Hooker*, 2 Mer. 424.
11 Ves. jr. 468.

§ 35. When contracts are made to lease, convey, or do other acts, and a penalty is inserted for non-performance, and the contractee seeks to enforce the penalty, equity will often relieve against the legal right, and direct it to stand as a security only for the damage he has really sustained. As where the plt. gave a bond to the deft. in a penalty to secure to him a certain room in the plt's. house, the deft. had sued for the penalty. On the plt's. bill the chancellor ordered an issue, of *quantum damnificatus* and an injunction till the hearing. 1 Bro. C. C. 419, *Hardy v. Martin*; 1 Ch. Ca. 190, *Holt v. Holt*. So if a covenant to convey an estate sold, and in it is a clause that the deposit shall be forfeited if the purchase money be not paid on a certain day, the court will relieve against the forfeiture of the deposit, on the purchaser putting the seller in the same situation he would have been if the contract had been performed at the same time agreed. *Stapleton v. Scott*, 16 Ves. jr. 272; *Stoddart v. Smith*, 5 Bin. 355.

1 P. W. 662, *Brown v. Barkham*.

§ 36. *Increasing interest as a penalty.* A contracts to pay four per cent, and if not paid at the day, then five per cent, and fails so to pay. He may be relieved on paying the four per cent, and interest thereon from the time. *Quere* as to relief if long delayed; that is, compound interest on the original contract. *Quere* as taking less than legal interest on prompt payment. See *Seton v. Slade*, 7 Ves. 273; 2 Vern. 516; New. 311, 312..

2 Vern. 119, *Woodward v. Gyles*.—Ch. 101, a. 1, s. 14.—2 Bro. P. C. 436.

If one covenant to do an act or to abstain from it, as a lessee not to plough any part of the pasture land, and the contract itself assesses the damages, equity will not interfere, as the parties have agreed the damages and there is no other measure. See 1 Fonbl. 142. Nor relieve against the payment of assessed damages. Ch. 101, a. 1, s. 14, cited New. 313; 2 Bro. P. C. 431. See *Blake v. East India Company*, and other cases, ch. 28, *Damages*; 3 Atk. 395; but relieves, as *Wafer v. Mocato*, ch. 28, a. 5, as to damages.

1 Vern. 460, *Newton v. Rowse*.—2 Bro. C. C. 8, *Hale v. Webb*.—New. on Con. 230. 1 Ch. R. 60, *Bidlake v. Ld. Arundel*.

§. 37. In the specific performance of covenants and contracts, or in giving relief therein, equity will not go beyond the penalty, except in a few cases. There can be but one ground for equity as well as law to act upon, and that is, the real intentions of the real contract meant by the parties, uninfluenced by fraud or by mistake; the exceptions are events not thought of in making the contract, but had they been, the parties would no doubt have provided for them. The plt. put his son with an attorney, and gave with him £120, to return £60, if he died in a year. He died within three weeks. Equity decreed £100 to be returned. 2 Ch. Ca. 19; 1 Fonbl. 365;

1 Ves. 256, *Whitmell v. Farrel*. "In general cases, equity will certainly give no relief beyond the provisions of the contract." It relieves against the penalty, and so far controls the legal effect of the contract, but relieves not beyond the penalty. 1 Ch. Ca. 226, *Davis v. Curtis*; see ch. 148, and especially art. 13; as to penalties in equity, Sugden 155 &c.

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§ 38. Equity moulds covenants and contracts to effectuate the parties' real intentions, especially in providing for their issue and relations, on the principle, that when they make them they can contemplate but little more than the mere heads of agreement;—generally relate to articles of marriage in England, too little practised upon in this country, here to be well understood.

See Fearn
on Contingent Remainders, 1 Eq. Ca. Abr. 387.

§ 39. *A covenant in articles to convey is extinguished by a conveyance accepted.* As where A covenanted to convey to B, Sept. 23, 1809, a farm, A warranted to contain fifty-eight acres of land. A made his deed to B of it, stating the bounds, containing fifty-eight acres. This B accepted in performance of the covenants to convey &c., which were declared to be void, but being in C's hands were not cancelled. Held, the articles were extinct; but held, also, parties may enter into covenants collateral to the deed. A deed may be deemed a part execution of the contract, if the two instruments shew such intent.

10 Johns R. 297, 300, *Houghtaling v. Lewis*.

ART. 3. *Seizin and disseizin.*

§ 1. As it is a settled rule of law that one who has seizin of lands may convey them, whether his seizin be by right or by wrong; and another rule, that he who has no seizin, but is disseized, cannot convey them, though he have a right to them. And as he who has the seizin, though by wrong, may covenant he is seized, and there is no breach of covenant; nor if he also covenant he has good right to convey. Seizin and disseizin are important articles in matters of covenant respecting lands or real estate. Also as the grantee's entry and seizin thereon is often material; seizin, disseizin, and possession are among the first things well to be understood in conveyances, and in regard to covenants therein.

§ 2. A want of seizin or possession will be found to be the most common impediment to a conveyance, though the grantor or covenantor have right. Hence, if conusor of a statute remain in possession after the sheriff makes livery to the conusee, he cannot convey; for the conusor's possession must be *tortious*, and so turns the conusee's estate to a mere right, a mere right of entry, or of action, neither of which can be sold or conveyed.

2 Salk. 563, *Hammond v. Wood*.—4 Cruise, 101.

The heir, before entry, being seized in law, or the possession being vacant, or no other person in possession, the law

CH. 104. presumes the heir in possession, who has the right ; and **then** he may lease or convey ; but if before the heir enters, A **en-**

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Watkins' Law of Descent, 8 9, 15, 16, 27, 29, 32, 50 — The manner of stating seizin, 2 Ch. on Pl. 199, 220, and sundry notes thereon.—See Ch. 109, a. 4, s. 20, 21, 22, more as to disseizin ; as to disseizin & descent cast, see Ch. 132.

by his entry, fills the possession, and then the law will **not** suppose the heir is seized, or as having seizin in law. In **this** case the heir cannot sell, pending the abatement ; for **having** only a right, it cannot be granted or conveyed. In the **feudal** law, if the feoffee died before livery, neither he nor his **heir** took any estate ; for the livery of seizin was essential to **com-**plete the feoffment. The same principle applies to him in **re-**mainder or reversion, for where the tenant for life dies, and **a** stranger intrudes, before he in remainder or reversion enters, this intrusion has the same effect as the abatement in the **heir's** case. And generally where one has not a power to convey, his covenant to convey is broken as soon as it is made ; also his attempt to convey is fruitless.

§ 3. So wherever the owner of the land is disseized, he cannot convey ; in other words, a man to convey &c. must be in a proper condition to convey, to contract, or covenant ; to convey, he must be seized in law, or in fact by himself or his tenant, as it is the very essence of a conveyance to transfer the seizin from grantor to grantee.

5 Wood's Con. 27, 108. —3 Bl. Com. 178.—1 Inst. 9 a.—2 Ins. 672.

It is a settled rule of law that one cannot grant or charge that which is not in his possession, though he has a right to it. If one be disseized of land, and before re-entry grant it, or his right to it, or a rent out of it, to a stranger, the grant is void, but he may release his right. Though a stranger may take my rent, or use my common, I may grant it ; for a man cannot be out of possession of these things, lying in grant, but at his election. But if A get a deed of B's land by fraud and imposition, B is still so seized that he may devise, though the deed be recorded &c. 15 Mass. R. 113. Deed was made after the will ; and no possession taken under the deed until after B's death ; but had A actually entered, claiming the land as his, before B's death, this entry might have been a disseizin of him, so as to have made his devise inoperative.

§ 4. These few considerations lead to a brief inquiry, what is seizin and disseizin. Without entering into a mass of abstruse learning on these heads, most of it peculiar to the feudal system, it may generally be observed, that seizin can be of nothing but a freehold, an estate for life or more ; he who has a less estate has merely possession. Seizin is in law, or in fact ; so seizin is with title, or without title, or by disseizin, abatement, or intrusion. Disseizin can be but in fee simple. The various alterations in the law, said Lord Mansfield, in three centuries, " have left us but the names of *feoffment*, *seizin*, *tenure*, and *freeholder*, without any precise knowledge of the

thing originally signified by these sounds; the idea modern times annex to a freehold, or freeholder, is taken merely from the duration of the estate." And that seizin, in modern perception, is only the possession in fact, or in presumption of law, of him who has an estate for life, or of inheritance, by title or by disseizin. The feudists meant by seizin, a "naked possession, clothed with solemnities of the feudal tenure;" and these were so formal and public, as to make the man having this seizin as well known as a "mayor of a corporation." A subject might intrude upon, or wrongfully dispossess, the king, but never could disseize him; because he never could stand in the king's seizin or tenure, nor the king in the seizin, tenure, or feudal relation, of the subject; because the solemnities, the essence of this feudal seizin, never applied to the king. In time the remedy by assize of novel disseizin, was extended to "every trespass or injury done to his real property," if the owner, by bringing his assize, thought fit to admit himself disseized. And in our practice it is very common to try a trespass or a wrongful dispossession, as a disseizin, and the dispossession of the Commonwealth, as an intrusion, not as a disseizin; considering the Commonwealth cannot be disseized, without any distinct ideas, because the king could not be disseized, as he could not stand in the feudal seizin of the subject. As assize for novel disseizin lay as for a disseizin, for the benefit of the owner's remedy, against mere advisers, not tenants, against a tenant not a disseizor, or against the heir or feoffee of the disseizor; so against a tenant not ready to pay his rent seck, when demanded, or for an outrageous distress; so against one for pasturing another's land, or for receiving his rent, without his consent, &c. &c. It is clear, that long since, the technical notions of seizin and disseizin were not much regarded, if understood.

§ 5. According to Comyns, "a seizing, in fact, is attained by an actual entry into lands or tenements." So "by an entry into a part, in the name of the whole." "So a receipt of rents, or profits will give actual seizin." "So if the heir lease for years, or at will, the entry of the lessee gives an actual seizin to the lessor." And Blackstone considers open possession, now, as in the place of "the ancient feudal investiture."

§ 6. Of course "disseizin is the tortious *oust* of seizin in lands or tenements." "As if a man enter into lands or tenements, where his entry is not congeable, and *ousts* another of his freehold," or actually *ousts* him who has a freehold. "If he enter on the possession of the lessee, this *ousts* the lessor of the freehold." "So if a man disturb the entry of him who has right to enter into land, it will be a disseizin." "But an act which does not *oust* him who has the freehold, though it be tortious, will not be a disseizin." Nor can "tak-

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A disseizor may assign dower, 1 Cruise, 161. And is a good tenant to the præcipe, 6 Cruise, 232. Forms, Bohn, 162, 166. Co. L. 153, 180, 181.—1 Burr. 110.—Lit Sect. 223. 2 Inst. 412, 413.—Style, 407. Aston's Entries.

6 Com. D. 261.

2 Bl. Com. 209.—3 Bl. Com. 169 &c. —6 Com. D. 265.—Lit. Sect. 279.—Cowp. 689.—1 Salk. 246.—Co. L. 182.—1 Cruise, 250.—1 Burr. 113.—4 Wood's Con. 447, 449.—8 Mod. 55.

CH. 104. ing possession under a judgment in ejectment be a disseizin of the freehold." "So livery of seizin is the giving possession of lands or tenements corporeal," and can be only when the freehold estate passes immediately on doing the act. Hence no freehold by livery can ever pass to commence in futuro. What is evidence of ouster, see Ch. 92.

Art. 3.
And Noy's
Max 81.

Doe v. Horde,
Cowp 693.—
Salk. 246.—3
Salk. 135.—
Co. L. 281,
282, 283.—3
Bl. Com. 170.
—Noy's Max.
81.—Hob.
120.

"Every disseizin is a trespass, but every trespass is not a disseizin." "A disseizin is where one enters, intending to usurp the possession and to oust another of the freehold." "Hence the judge is to ask with what intent one enters." Is it by taking the profits or claiming the inheritance? "Disseizin is without order of law, and by an actual ouster of a person who has the freehold." But it is no disseizin to enter and not actually expel; and where two are in the land, the law judges the possession in him who has the right. But if the lessee after his term ended, refuse on demand to deliver up the possession, he is a disseizor. To turn the stream is a disseizin of a mill. So to enter and take the profits of land. So if one enter my house in my absence and actually keep me out of possession, this is a disseizin. Livery of seizin must be in the lifetime of him who made the estate.

6 Com. D.
164.—Co. L.
243, 273.—
2 Bac. Abr.
202.—3 Bac.
Abr. 504.—
6 Mod. 44,
45.—Salk.
285, Ford v.
Grey; 423,
Reading v.
Royston.—
1 Ld. Raym.
Dame's case.
—1 Inst. 373.

§ 7. A parcener, joint-tenant, or tenant in common, cannot be disseized by his fellow without an actual ouster; and the possession of one is generally the possession of another. If one of them enters into the whole land and takes all the profits, it shall be deemed the entry of both; but if one enters after the death of her ancestor, claiming the whole, and takes the profits of the whole, this divests the purparty of the other sister. So if one enters and makes a feoffment, the subsequent act explains the preceding entry, and shews she was seized of the whole; yet it is not properly a disseizin, for the other never was seized; nor an abatement, for both make but one heir;—they have but one freehold.

Cowp. 217,
Doe v. Prosser.
If the
grantee of
tenant at will
enter, it is a
disseizin.
1 Cruise, 271.

§ 8. If on demand by one tenant in common, the other refuse to pay, and deny his title, saying he claims the whole, and continue possession, this possession is adverse and an ouster. Refusing to pay is no ouster, but he must deny the title. To make an actual ouster, a turning out is not necessary; a man may come in by rightful possession and yet hold over adversely without a title, and this under circumstances may be equivalent to an actual ouster. A lessee's entry before his lease commences is a disseizin.

Cowper, 217.
Christian's
Notes, 24, on
2 Bl. Com.

§ 9. Adverse possession or the uninterrupted receipt of the rents and profits, is now held to be evidence of an actual ouster. And where one tenant in common has been in undisturbed possession for twenty years, in an ejectment brought against him by the co-tenant, the jury will be directed to presume an actual ouster, and so to find for the deft.

Though this possession, however, for twenty years or more, will be taken as evidence of an actual ouster twenty years back or more, and that the co-tenant plt. has not had any possession in that time; and hence, his right of entry is gone, and therefore, in England, he cannot have ejectment; yet his right to a higher action is not thereby affected.

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§ 10. For trespass on lot No. 5, near Wiscasset meeting-house. Plea, that the deft. entered as a servant to Mrs. Baker, and that the *locus in quo* is her soil and freehold; proved her possession within twenty years, and as to title failed; because a deed or will cannot pass lands when in the adverse possession of another, either the opposite party or a third person.

Lincoln, July Term, 1795, Williams or Wiscasset Company v. Parsons.

§ 11. In this action the court decided that the plt's. elder possession from 1749 to 1764, fifteen years, was a better title than the deft's. younger possession from 1764 to 1794, though thirty years, neither party having title by deed or writings.

Lincoln, July Term, 1797, M'Cobb v. Hearndell.

§ 12. In this case the court held, that the grantor of land, who covenanted in his deed, that he had "full power, good right, and lawful authority to sell the land;" and that he would warrant the premises against all persons claiming under the grantor, was a witness for the grantee, he suing one who did no claim under the grantor: and that this covenant amounted "to a covenant the land should pass by the conveyance, and this covenant is not broken if he was in fact seized, either by wrong or a defeasable title." Borland, the covenantor in this case, claimed to be seized of the land demanded, Jan. 1, 1776, and conveyed to the demandant, who counted on his own seizin against Henley, who did not claim under Borland.

4 Mass. R. 441, Twambly v. Henley, cited 1 Phil. Evid. 60. Like principle 1 Serg. & Rawles, 48, Dorsey v. Jackman.— 2 Bin. 95, 108, Gratz v. Ewalt.— 6 Bin. 500.

§ 13. In this case the court decided, that by a conveyance of land in fee in this State, the estate passes to the grantee immediately, and does not remain in the grantor till the deed is acknowledged and recorded, of course the grantee on the execution of the deed becomes seized. [But this must be understood to be the case only where the grantor when he executes the deed is seized in fact, or in law, by himself or his tenant, and there is no adverse seizin.] And if the grantor cancel such a deed with the grantee's consent, and a second conveyance is made to a third person, knowing of the first, this shall not defeat an intermediate attachment made by the creditor of the first grantee. In this case, Marshall v. Fisk, Adams in 1795, seized in fee of the close, executed a deed of it to Spaulding and Foster, who paid for it in part, and gave their note for the residue, and entered and took possession and continued in possession till September 9, 1805. July 17, 1805, Jonathan and Charles Williams, creditors of

6 Mass. R. 24, Marshall v. Fisk.

CH. 104. Foster, attached his moiety, got judgment, and in March
 Art. 3. 1806 levied on it, and had seizin delivered to them. Said
 note was assigned to one Prescott, and in June 1805, he
 demanded payment or security from Spaulding and Foster,
 who delivered to him said deed from Adams, not recorded,
 and authorized him to sell the land, to return to Adams his
 deed and take a new one from him to the purchaser; Prescott
 to account &c. In September 1805, pending said attachment,
 Prescott delivered to Adams his said deed, and received from
 him a deed to Prescott in fee, duly recorded, Adams, Prescott,
 and Foster well knowing of said attachment. The action was
 trespass against the deft., who pleaded in bar the title of the
 Williamses, that they were seized in fee of an undivided moiety
 &c., and he entered as their servant, and by their command &c.,
 and the plt. traversed that seizin, and issue. The court held:
 1. "A conveyance by deed of feoffment at common law must
 be followed by the ceremony of *livery of seizin*, as an act of
 notoriety to the freeholders of the county:" 2. The acknowledgment
 is notice to the register: 3. "If a second purchaser has had
 notice of the prior conveyance, notice to him by recording the
 deed is unnecessary, and the second conveyance is fraudulent:"
 4. "So if the first purchaser enter under his deed, not recorded,
 and while he is in the actual and open possession the second
 conveyance is executed," this is fraudulent and void; for this
 possession is notice: 5. Our enrolment is substituted in the
 place of livery of seizin, and notice is not required against
 the grantor or his heirs, or against a second purchaser having
 actual or presumptive notice of the former conveyance, "but
 against him who has no such notice;" Prescott had this notice
 &c., and the deed to him was fraudulent as to the attaching
 creditors: 6. "As upon a sound analogy the attachment must
 be considered as having the effect of a prior purchase:" 7.
 The court was satisfied "the estate was vested in Spaulding
 & Foster upon their actually entering under Adams' deed:"
 8. The statute of uses has been adopted in this state: 9.
 By our statute of 1784, ch. 37, "conveyances by deed
 acknowledged and recorded, made by grantors having good
 right to convey, may have the effect of feoffment without
 an actual entry of the grantee:" 10. Every conveyance by
 that act must be "acknowledged and recorded, to entitle the
 grantee to hold the estate conveyed against any person not
 having actual or presumptive notice of the conveyance, or not
 being an heir of the grantor: 11. "The conveyance by Adams
 to Spaulding and Foster, and their entry under it may well be
 considered as having the effect of a feoffment with respect
 to the grantor and his heirs, and to all persons having notice
 of the conveyance: 12 See *Thatcher v. Gill*, post

§ 14. *One having seizin by wrong may convey.* Hence, CH. 104. "one in possession of land claiming to hold it in fee simple, is sufficiently seized to enable him to convey." And if he covenant, he is seized and has a right to convey, his covenant is not broken, though his seizin is tortious; nor does any action lie against him, but on his warranty after eviction. But the warrantee may voluntarily yield up the possession, if demanded by him who has a good paramount title. The warrantee is not bound to stand a lawsuit when he knows he must fail; but he yields at his peril and risk of such title.

Art. 3.
4 Mass. R. 408, *Bearce v. Jackson*, admr., and 354, *Drinkwater v. Drinkwater*, admr., and 340, *Hamilton v. Cutts*, exr.

§ 15. And in this last case of *Hamilton v. Cutts*, it was held, that one having obtained judgment against the estate of an intestate in his administrator's hands, may extend his execution on the real estate fraudulently conveyed &c. by the deceased, or if the administrator be licensed to sell the estate of the intestate, he may sell estate so conveyed in whose hands soever it may be. So the administrator may convey when neither he nor his grantee is in possession, but there is the adverse possession of the purchaser under the intestate. This being the case, the administrator cannot defend or sue to recover the real estate of his intestate, which on his death immediately descends to his heirs; and into which the administrator has no right of entry, or to take the profits. But the administrator on such license may sell the intestate's lands to pay his debts, "whether they are in the possession of his heirs, or of his alienee, or his disseizor." "For no seizin of the heir, or of his alienee, or his disseizor, can defeat the naked authority of the administrator to sell on license." So when "an authority is given by the testator to his executor to sell his lands for the payment of his debts, the executor may sell, notwithstanding the death or the alienation of the devisee, and for the same reason notwithstanding his disseizin." "And the purchaser, by virtue of his deed, may lawfully enter into the land sold, and may count on his entry as a lawful seizin if it be disputed;" and this of necessity, for otherwise this license to sell may be defeated by the heir's conveyance or his disseizin &c.; but as in the case of *Gallison, administrator v. Lee*, executor, it may be otherwise, if the legatee or creditor suffers his legacy or debt to sleep many years, for thereby the right of entry may be gone.

Cutts' case, and *Drinkwater v. Drinkwater*.

§ 16. Occasional possession of a dock, or of flats, by laying a vessel thereon, is sufficient to enable the party to take a release, for this is the nature of the occupancy or possession.

4 Mass. R. 75, *Hamblet v. Francis*.

§ 17. If the devisor die seized of lands vacant or unoccupied, the devisee is seized without entry; so of one in remainder or reversion: but if the land be not so vacant, he can-

4 Mass. R. 64, *Wells v. Prince*.

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Art. 3.

3 Mass. R.
523, 546,
Gore v. Bra-
zier
And the judg-
ment debtor
loses his sei-
zin, 11 Mass.
R. 150, 166,
Wyman v.
Brigden, de-
cided on cov-
enant bro-
ken, p. 216,
221.

Langdon v.
Potter & al.
3 Mass. R.

2 Mass. R.
462, 476,
Cook v. Al-
len.

not convey till entry made, unless a stranger be in possession acknowledging his title, this is equivalent to an actual entry.

§ 18. It was resolved in this case, that when an execution is regularly levied on lands liable for debts, and returned and registered, and seizin and possession given by the officer to the creditor, he is thence actually seized and possessed, and may demand the lands on his own seizin, or have trespass against the tenant who shall continue in possession without the creditor's consent, or he may re-enter on him after the levy is completed; and therefore, this levy is a legal *ouster* of the tenant from the lands. Devisee's sale does not affect the creditor's lien. 4 Mass. R. 512.

§ 19. And an execution against the goods and estate of the deceased person in the hands of his executor may be levied on lands, of which the testator died seized, in possession of an alienee of the devisee. And this, if the executor be residuary legatee, and has given bonds to pay debts and legacies.

§ 20. In this case it was decided, that partition on petition, and public notice, gives not only possession, but the right of possession to him to whom the land is assigned; so that the claimant can dispute the title with such assignee only in a writ of right. And where such claimant claims to hold in severalty; that is, 1000 acres, part of 19000 acres in Sanford &c. sold to the plts. by one Reed, to whom 1000 acres were set off in 1800 in partition. Deft. claimed under Frye, who entered above thirty years ago, and held, till the deft. recovered seizin on Frye's mortgage, dated Nov. 12, 1787; this mortgage was foreclosed, and the deft., Allen, has ever since possessed the land. "Judgments do not bind the rights of any but parties and privies, understanding by parties, all persons who might have been parties on the record, but from their own laches." If certain persons are named as co-tenants, in the petition for partition, they, their heirs and assigns only, are concluded by the partition made. If supposed to be persons unknown, and notice is given to all persons interested, and partition is made, "no person appearing, this partition shall conclude all persons whatever as to their right of possession." Any one interested is authorized to appear and protect his interest by falsifying the petition in any material point; and if he lay by, he is bound as fully as if he had appeared and then made default. "If the parties interested are not known, any person concerned in interest," in common or severalty in the land described in the petition, "may appear and plead;" and if he do not, he admits in the eye of the law the material facts to be true, stated in the petition, and is concluded as to the right of possession. And one fact stated in the petition is, that the petitioner holds in common and undivided, throughout the tract of land describ-

ed, with divers persons unknown, and this fact is admitted by one who might appear and does not ; and also, by such a person the proportion of the petitioner is admitted. But the petition does not go on the absolute indefeasible right of property in the petitioner ; and therefore, this is not admitted by one interested and not appearing, and so Allen was still entitled to his writ of right. From all which it manifestly results, that there is a material defect in this process of partition, as one may have his part set off, and after he has erected valuable buildings &c. on it, he may be disturbed with this writ of right brought by another claiming an interest in the land divided.

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§ 21. *The seizin that enables one to convey.* If A “make a deed of feoffment of divers parcels of land to divers men jointly, and make livery of one parcel to one feoffee, according to the deed, this passes all to all.” And all are seized and may convey, or safely contract to convey ; otherwise, if there be no deed but only livery. But it must be intended that all the parcels lay in one county.

Dyer.

§ 22. So if in a meadow of eighty acres one be entitled to thirteen acres in one part this year, and in another part next year, and the deed is to him of thirteen acres in the meadow, without describing any in certainty, by a livery of thirteen acres allotted to him this year, all his interest shall pass. So livery or allotting of thirteen acres next year in another part or place, all passes, and his seizin is complete and he may convey.

Co. L. 48, 49

“Lessor for years of several closes in one county makes livery of them, the lessee or his wife or servants being then in the house, or on part of the land, this is void ; for the possession continuing in the lessee no livery can be made of the land, but if his cattle only had been there the livery had been good.

Co. L. 49.

§ 23. If lands descend to two daughters of the father by the first venter in England, and after his death an infant son is born of a second venter, the mother at the time residing in part of the premises, and receiving the rents for the other parts, as well before as after her son's birth, and he die, five weeks old ; this is a sufficient actual seizin in the son to make a *possessio patris* ; hence, a good seizin to convey. The daughters also remained in the house in which their father died, at and after his death, and the seizin in law was vested in them by law on his death, and in like manner the law vested a seizin in law in the son the moment he was born. If the daughters had aliened or been disseized, the son would not have been actually seized, but only would have had a right of entry. The mother and daughters merely remained in possession, and the mother received the rents, but did not declare to what purpose, and the law will then presume for the benefit

2 W. Bl. 938,
Goodtitle v.
Newman.
Same case,
3 Wils. 616,
523.

CH. 104. of the daughters entitled to them till the son was born, and
Art. 3. then for his use ; but the instant he was born his mother became his guardian in socage, and nothing appearing otherwise, the law presumes she entered as such to her son, as soon as he was born, and so was ~~in~~ without any declaration how she was ~~in~~. Acts without words may make an entry, but not words without an act. If the mother had entered as guardian to the daughters, not being such, or for dower not assigned, it had been a disseizin, as her entry would have been avowed and unlawful.

11 Co. 51, 52,
 Lifford's
 case.

§ 24. *The effect of re-entry on disseizins to enable one to convey.* If A disseize me and I re-enter, the law judges as to the disseizin, the freehold has remained in me, as well as to the corn, as to trees or grass. And if A's feoffee or lessee, or a second disseizor sow the land, or cut down trees or grass, sever and carry them away, or sell them to another, yet after my re-entry I may any where take the corn, trees, or grass ; for my re-entry has relation as to the property, to continue the freehold against them in me *ab initio* ; and the carrying away the corn &c. out of the land cannot alter the property.

5 Bac. Abr.
 183.

§ 25. So if A disseize B, and C disseize A, and B re-enter, he may have trespass against C, for B by his re-entry reduces the possession to himself from the time of the first disseizin. But it seems to be the better opinion, that if the disseizor make a feoffment or lease of the land to J. S., and then B, the disseizee, re-enter, he cannot have trespass against the feoffee or lessee ; for he comes in by title, and as to him B's right of entry is gone.

4 Mass. R.
 416, Proprietors of the Kennebec Purchase v. John Springer.

§ 26. *Extent of seizin by a tortious entry.* A tortious entry of one without claim of title is no disseizin further than he actually occupies ; but when he enters claiming a right, and gains a seizin by his entry, his seizin extends to all to which he claims a right. To disseize the owner of unsettled lands, the disseizor's entry and occupation must be such that the owner may be presumed to know that there is a possession adverse to his title. Therefore, where the demandants, the Proprietors of the Kennebec Purchase, 1769, had title to, and had possession of two lots in Augusta, and in 1775 one James Springer entered on the river lot, and in the fall of that year he caused this lot, also the back lot to be surveyed, and the bounds marked by spotting trees, and fenced part of the river lot and occupied it till he died ; and sometimes he cut a small piece of meadow, part of the back lot, the northerly half of which was sued for, but never enclosed any part of this back lot, and in 1792, he conveyed it by quit-claim deed to the tenant, Jonathan Springer, who then entered and since held possession : held by the court, that the survey &c. and

cutting the hay on the meadow was no disseizin of James Springer, as he did not claim a right or title to the land ; and that there was no disseizin of the demandants till 1792, when the tenant entered under his deed. The court did not consider the survey, the marking the trees, and cutting the grass as evidence of a claim of right in a wrongdoer, as there was no other evidence of a claim of right.

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§ 27. Disseizin by the wife ; regularly she cannot be a disseizoress by her assent, precedent or subsequent ; but only by her actual entry or proper act, or by being of covin and consent with her husband ; she can never be one by her husband's act, not if he disseize one to her use, for her agreement is void. And if both agree, she is not a disseizoress, unless covin be in the case ; but is one if after his death she agree to the disseizin ; nor is she one, if she and her husband enter into land in her right, for it shall be deemed his act only. She never can disseize to the use of her husband or of a stranger, for though she gains an estate by her entry, she cannot dispose of it to another. But if A take a distress for rent issuing out of her land, and she and her baron make *rescous*, both are disseizors. 21 E. IV. 53.

Baron &
Feme, 1
Inst. 357.—
12 E. IV. 9.

The court held: 1. That a conveyance of land when recorded, relates back to the time of its execution, and is evidence of a seizin in the grantee from that time, against all persons except a subsequent purchaser from the grantor without notice: 2. That a trespass on another's land will not amount to an *ouster* or disseizin, without a knowledge thereof by the owner, expressed or implied. If one have title to land, and fence and pasture it, claiming title, these acts prove legal seizin ; but if no title, they are trespasses, and not a disseizin of the owner until proved he has notice of them ; " otherwise a private act of trespass on the land of another might be evidence of an *ouster*, without any knowledge on the part of the owner of the land." But " this notice may be proved either by direct evidence of the fact, or the jury may presume it from circumstances in evidence. As where it has been proved the owner's cattle have been turned off the land, or his servant refused an entry &c., or a continuance of the trespass for a long time is shewn, when the owner or his agent lives in the neighbourhood:" 3. The tenant by pleading *nul disseizin* admits he has the freehold where the writ alleges he has it: 4. A release to one not in possession, if made for a valuable consideration, will be construed to be any other lawful conveyance by which the estate might pass.

7 Mass. R.
381, Pray v.
Peirce. See
Ch. 92, a. 2.

§ 28. In this case Samuel Waldo and others owned two fifths of about two hundred acres of land in Thomaston, in fee. The deft. had possession several years under a deed,

7 Mass. R.
488, Knox &
al. v. Jenks.
A. D. 1811.

CH. 104. dated June 2, 1785, from a prior possessor without title.
 Art. 3. Oct. 11, 1793, said Waldo &c. made their deed to Henry Knox deceased, recorded Oct. 22, 1794. Nov. 29, 1793, said Waldo & al. by their attorney duly appointed to enter on the land demanded, and thereon to deliver the said deed, entered on the land and delivered possession to Knox's attorney. Held, said Knox became seized by virtue of this deed so delivered on the land, and on this seizin the demandant's heirs declared and recovered; though "Jenks entered under his said deed, improved and lived upon the said land, erected a dwelling-house thereon, and gradually extended his improvements; and in the year 1793, had as much as twenty acres of the land enclosed and under cultivation." As to this twenty acres at least, the deft. urged that the said deed of Waldo & al. to Knox could not operate, as when it was executed the deft. was "in full and quiet possession of the land, and the grantors were disseized," and that the case found not that the attorney delivered the deed on the land, but a delivery of the land only; and if it had been delivered on the land it would have had no effect, "unless the deed had been a feoffment." Strangers and disseizors cannot except, and say executors and administrators have not pursued the powers and directions of the statutes authorizing them to sell lands to pay debts &c. "But a seizin may be obtained under their deed by the grantee named therein, and his entry under it upon a disseizor of the estate, or the feoffee of the disseizor, is lawful and will revert the possession according to the title. Though Waldo & al. were disseized by Jenks, yet the court said, their right of entry remained in Nov. 1793, when their attorney entered upon Jenks; and as the attorney "was specially authorized to enter upon the land demanded, and thereon to deliver the deed," it afforded reasonable grounds to presume the deed was delivered accordingly, and there was no sufficient evidence of a prior delivery of it. But if the deed was not delivered on the land, but the land was delivered as urged, yet this conveyance might be good; and the court said, "a feoffment by a feoffor out of possession, and a livery on the estate conveyed, bring back the estate and vest the freehold perfectly in the feoffee; an operation which it seems is not allowed to a deed of bargain and sale, or any other mode of conveyance. If necessary then to effectuate the intentions of the parties, we see no difficulty in construing the deed in question, a feoffment with livery of seizin on the land conveyed." 5 Com. D., Feoffment, A 1; Co. L. 48. "No precise words are requisite to a feoffment, and here was a livery in fact, according to the deed; or if that ceremony had been wanting, it would be supplied by the statute effect from an

acknowledgment and registry, the impediment to the operation of the deed having been removed by an actual entry upon the land conveyed." If any part of this case be doubtful law, it is the last clause ; and this is law, if the court meant an entry on the land when it was intended the deed should take effect. But if the court by the actual entry named, meant an entry by the grantee alone, after the deed was executed, this could not give the deed operation ; for if there be a disseizin, the grantor's deed can never operate, unless he himself enter and remove the impediment so far as to gain a seizin to be conveyed by the execution of his deed. Even to convey by feoffment, which may be signed and sealed and delivered before the parties enter on the land, as above stated, of which the feoffor is disseized, he must enter and make livery of seizin. And if he were to execute the deed of feoffment, not on the land, and leave the feoffee alone to enter on it afterwards there would be no conveyance ; for the feoffee's entry alone constitutes no livery of seizin ; for this is the very act of the feoffor's making livery to the feoffee. And in the case of any other conveyance than by feoffment, it is a settled principle the disseizin must be removed so that the grantor himself may be seized at the moment he delivers his deed ; for if he be not seized at that moment, his deed cannot operate then to pass the seizin or land, and no after act, especially of the grantee, can aid it. Where the grantee is not in possession and so takes not by release, and there is a disseizin by, or an adverse seizin or possession in a third person, the right of entry can be only in the grantor, and can no more be transferred to the grantee, so as to enable him legally to enter upon the disseizor, than a mere right of action can be transferred or sold. The actual entry therefore, mentioned by the court, was probably intended an entry by the parties when the deed was delivered or when the livery of seizin was made ; and the delivery was in the name of seizin. A deed delivered in the name of seizin on the land, instantly operates as livery of seizin : and 2. As a delivery of the deed. 9 Co. 136, Thoroughgood's case.

§ 29. By 1 Jam. I, ch. 15, commissioners were empowered to sell and convey a bankrupt's real estate by deed indented and enrolled. As the act limited no time for the enrolment, held, the estate did not pass till the deed was enrolled. But it may be observed that the commissioners had no estate or interest in his estate, but only a naked power to sell and convey by such deed, and such power must be strictly pursued ; nor had they any interest out of which a use could arise to their purchaser, as it can where the grantor has an estate in the land. This case therefore is not at all like our sale and conveyance on our statutes.

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9 Co. 136.—
2 Jones, 196.
—1 Burr. 120.

CH. 104. § 30. *The effect of a feoffment at common law with or without livery of seizin.* "A deed of feoffment without livery

Art. 3.
Lit. sect. 70.
—3 Mass. R.
578.—4 Cruise,
101, &c.—1
Ins. 52 b.

of seizin amounted to no more than a license to the feoffee to enter and improve during the will of the feoffor, who, when it pleased him might put the feoffee out." And "no estate passed upon a feoffment until the livery of seizin was made by the feoffor, and if he or the feoffee died before livery, the deed became of no effect. If the feoffor died, the land descended to his heirs; and if the feoffee died before livery it could not be made to his heir; for then he should not take as heir by descent, according to the tenor of the deed, but as a purchaser."

3 Mass. R.
581, Flucker
v. Hall.

§ 31. If the grantee enter under our statute deed, he has the estate vested in him, and may sell and convey though his deed be not recorded. As where A conveyed to B, and his deed was not recorded, and Flucker purchased of B, and after this the deed to B was recorded: Held, unanimously, the estate passed to Flucker. This decision could not have been made but on the supposition the estate passed to B before his deed was recorded; nor does the case state that B entered and took possession before he made his deed to Flucker, nor was it necessary he should, if A did not hold adversely, though in possession, for if he acknowledged his deed and conveyance to B, then A become his tenant.

See Ch. 8 and
9.

§ 32. As by common law, one who wants seizin or possession cannot convey, so upon our statute the case is the same; hence while the grantee is in the visible possession, and improving the land as his in fee, the grantor has no capacity to make a second conveyance to another; and hence the grantee in possession, can hold the land without the aid of his deed, or of the statute of uses, against a second purchaser;—"his possession only is sufficient for the purpose:" and such grantee has an estate he can convey, for his possession being in his own right, the grantor's second sale is void. He has not seizin to convey, nor can his second deed raise any use. For one to raise a use out of an estate, he must at the time have the estate in being in him, and be in possession and of the use.

7 Mass. R.
138, Wellington
v. Gale.

§ 33. In this action of *entry sur disseizin*, the demandant counted on his own seizin, and disseizin by the tenant. The lands had been mortgaged but the mortgagee had not entered. The mortgagor's right of redemption was attached, and sold on execution to the demandant in fee, who received from the officer a regular deed, recorded, &c. "This was the evidence of the demandant's title." The court held, he obtained thereby the seizin he alleged, and might maintain his action against any stranger, unless such stranger had in fact disseized the mortgagor before the sale of the equity; so that a

prior and existing disseizin prevents the estate's passing to the buyer of the equity by such sale on the statute of 1798, ch. 76. And an entry before a lease begins is a disseizin. 1 Cruise, 250. CH. 104.
Art. 3.

§ 34. *What is a sufficient evidence of seizin in a writ of right.* 1. At common law it lies only against the tenant of the freehold demanded: 2. If "several tenants claiming parcels of land by distinct titles," be found in one writ, it may be pleaded in abatement: 3. If the plt. demand against any tenant, more than he holds, he may plead non-tenure as to the parcel not holden, and this by the old common law abated the writ, but not since 25 Ed. III, ch. 16, adopted here: 4. A plt. can no more support an action against several defts., having distinct seizins and titles, than he can against several defts. on several distinct contracts: 5. At common law non-tenure, joint tenure, sole tenure, and several tenure were good pleas in abatement to a writ of right, but in abatement only. Sup. Court of the U. S. Feb. 1814, Green v. Litter & al. 8 Cranch, 229, 254.—2 Wheaton's R. 306, may if not pleaded in abatement,—6 East. 272.—1 Ch. on Pl. 115.

6th. *Actual seizin*, at common law, is necessary in this writ &c., and is equally so in writs of entry: so is the declaration; was seized in his demesne as of fee &c., taking the esplees &c. But to prove actual seizin or seizin in deed, an actual entry under title, and taking the esplees is not necessary. In many cases this actual seizin is a constructive seizin in deed, which is sufficient seizin in a writ of right by intendment of law. As where the land is leased for years, curtesy may be without actual entry, or even receipt of rent. So in case of *possessio fratris*: so if an heir, or grantee of several parcels of land in the same county, enter into one parcel in the name of the whole, where there is no conflicting possession, the law adjudges him in the actual seizin of the whole. So if a man having a right of entry make a regular claim within view, he has actual seizin and possession, as much as if he actually entered. So livery within view, properly made, gives the feoffee seizin in deed, as effectually as an actual entry. There is therefore no question but in a writ of right the demandant must prove actual seizin in himself or ancestor within the limited time, and the real question is, when is the actual seizin proved. Clearly in various constructive ways, some of which are above stated; and this whenever the party does all necessary to be done, or all that can safely be done. So in conveyances to uses, the bargainee has complete seizin in deed without entry or livery of seizin. Com. D. tit. Uses, B. 1; Cruise Dig. 12; Shep. Touch. 223, &c.; Co. L. 271, &c. Hargrave's Notes. The taking of the esplees is but a consequence of seizin, and is not traversable;—is but evidence of seizin. The seizin in deed once established by a *pedis positio*, or by construction of law, the tak- 1 H. Bl. 1, Dally v. King.—2 Bos. & P. 270.—3 Bos. & P. 453.—Co. L. 29, Hargrave's Notes.—Litt. sect. 417, 418, 419.

Cro. El. 46.

CH. 104. ing of the esplees is a necessary inference of law, and the party seized is supposed to have them, though his tenant for years actually takes them; so if a mere trespasser, not claiming title, take them. A complete seizin may exist, as of a barren rock, without the existence of esplees. And a perfect title may pass, and seizin accrue of waste and wilderness land by the deed or patent.

5 Co. 94, Berwick's case.

No livery of seizin is necessary to perfect a title by letters patent, as the grant is of record and equivalent to livery of seizin, and as notorious; but a freehold can no more be conveyed *in futuro* by such letters than by livery; as in neither case can there be a present livery of a future freehold estate; also it is useless, and often impossible to give actual possession, or to make an actual entry, in a savage wilderness. And if, at common law, an actual *pedis positio* followed by actually taking the profits, be necessary to maintain a writ of right, (a thing the court did not admit,) yet the doctrine would be inapplicable to the waste and vacant lands of our country. Such a case does not come within the reason of making livery of seizin; for of what notoriety to the vicinage can it be in a perfect wilderness. And said the court, "we are entirely satisfied that a conveyance of wild and vacant lands gives a constructive seizin thereof in deed to the grantee, and attaches to him all the legal remedies incident to the estate."

Ch. 228, a. 3,
s. 8.

7th. "A better subsisting adverse title in a third person is no defence in a writ of right.

8th. If tenants with distinct titles are sued and join the *mise*, they admit they are joint tenants of the whole.

9th. If a man enter into land, having title, his seizin is not bounded by his actual occupancy, but is held to be co-extensive with his title; but if without title, his seizin is confined to his possession by metes and bounds. See *Kennebec Proprietors v. Springer*.

Co. L. 252.

10. "If a man, having title to land, enter into a part in the name of the whole, he is, upon common law principles, adjudged in seizin of the whole, notwithstanding any adverse seizin thereof; but if the land be in the seizin of several tenants claiming different parcels thereof in severalty, an entry into a parcel held by one tenant will not give seizin of the parcels held by the other tenants, but there must be an entry into each." So "an entry into a parcel which is vacant will not give seizin of a parcel which is in an adverse seizin; but an entry into the last parcel in the name of the whole, will enure as an entry into the vacant parcel."

These were the general principles established or recognised in this important case,—clearly good law. Many other points in it were decided relating to the statutes of Virginia and Kentucky, but being of a local nature, it is not material to notice them in this place.

§ 35. *A case of seizin and disseizin.* In this writ of entry CH. 104.
 our disseizin the demandant counted on the seizin of Josiah Art. 3.
 Newhall, his grandfather, within fifty years, of a few feet of
 land in Boston, and upon a disseizin of the said Josiah by
 Alexander Hopkins, who demised the same to the tenant. 6 Mass. R.
360, Newhall
v. Hopkins.
 Plea, said Hopkins did not disseize the said Josiah &c. The
 demandant proved the said Josiah was seized, rather possess-
 ed about fifteen years within fifty years, but proved no title ;
 That above thirty years before the action, the said Alexander
 moved his fence more southwesterly, and so as to take in the
 land demanded, he before occupying the northeast side of the
 prior fence ; but there was no proof when he thus moved the
 fence, and so took possession of the land demanded, previously
 so held by said Josiah, that he, the said Alexander Hopkins,
 then had a right of entry ; and the want of proof of this right
 was the main ground of the motion for a new trial. Many
 matters were ably discussed. But the verdict for the tenant
 was supported by the court on a single point, to wit, that from
 all the evidence in the case, and from all the circumstances
 of it, the judge might well instruct the jury to presume, and
 they might well presume, that Alexander Hopkins, when he
 moved the fence, had this right of entry ; so that when he
 built the fence he did not disseize Josiah Newhall. The
 court admitted if his actual seizin had been proved within fifty
 years, Hopkins would be put to shew his right of entry when
 he erected the fence. But Josiah Newhall's actual seizin was
 left doubtful ; so that the jury was not bound by the evidence
 of it, if in the case there was any facts creating a presumption
 inconsistent with this evidence. Now there was much evi-
 dence to make it questionable if Josiah Newhall was ever in
 fact seized of the land demanded ; and further it was proper
 to leave it to the jury, if such seizin was proved, to say
 " whether the circumstances, under which an entry by Hop-
 kins was made, did not satisfy them that the former possession
 of Josiah Newhall was wrongful or by mistake ; and that the
 line was established by the mutual consent of the parties,"
 when the fence was built, acquiesced in near thirty years.

§ 36. *Seizin necessary to maintain a writ of right.* Writ 10 Mass. R.
281, 284,
Leonard v.
Leonard.
 of right to recover a fourth part of certain lands on the seizin
 of the demandant's father, within sixty years. Issue on the
 mere right. Demandant proved his grandfather, John Leon-
 ard, Nov. 1744, died seized, having devised the same premi-
 ses to his four sons, John, Daniel, Asaph, and Russell ; prov-
 ed, Dec. 11, 1744, Russell, the demandant's father, was about
 fourteen years old when his father died, other three of age,
 and agreed to divide the estate among them, and that Daniel,
 the tenant's father, should take Russell's share, and buy for

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Art. 3.

him lands to make him a farm, when he should come of age, equal in value to his share. Daniel, within two years of his father's death took possession accordingly, and occupied till his death, and the same descended to his children, the tenant one of them, and they occupied till this action was commenced, Aug. 12, 1812. No conveyance from Russell to Daniel; but May 4, 1748, Daniel acknowledged the receipt of monies from John and Asaph, in writing, to buy a tract of land for said Russell's share, and engaged to pay him his share, and against his demand, to indemnify the executors &c. Russell lived in the mansion house with his mother till he was twenty-seven years of age, then moved to his own house. Neither he nor his heirs ever entered on or claimed the demanded premises, except by the present suit. March 8, 1756, said Daniel conveyed land to said Russell, in pursuance of the said agreement, and paid him several sums of money on the same account. In the year 1771, arbitrators, chosen by Daniel and Russel, awarded said Daniel to convey to said Russel certain grants of land to complete said agreement, and of them Russell took possession, but received no conveyance of them, and has since been ejected by Daniel's heirs. Judgment for the tenant for he shewed a seizin in himself and ancestors above sixty years, that is from 1748, the date of the agreement for compensation to Russell, which served, at least, to prove the *ouster* of Russell and Daniel's sole seizin. In this, Russell acquiesced after he came of age and received compensation in part, and had no seizin within the sixty years. In this case it will be observed, that Russell was disseized and *ousted* from 1748 to 1757, though during that time he quietly lived upon the land with his mother and retained his legal title.

10. Mass. R.
421, Foster v.
Mellen.

§ 37. *Entry sur disseizin* on the demandants own seizin within thirty years, on his purchase of the debtor's equity of redemption sold on execution: and held, he could aver no seizin or title against any person but the execution debtor, or his immediate tenants or assigns. Dec. 15, 1806, Oliver Hildreth, seized in fee, mortgaged to said Mellen and made another to him, April 29, 1807. July 18, 1807, Hildreth conveyed to John Putnam, subject to said two mortgages to Mellen. July 23, 1807, Putnam mortgaged to said Mellen. July 26, Mellen discharged the two mortgages Hildreth gave; the sums due thereon being secured in said Putnam's mortgage. Hildreth being indebted to the demandant \$4000, March 16, 1807, gave him his note; this he endorsed to Benjamin Champney, who, May 13, 1807, sued Hildreth (before he sold to Putnam,) and May 18th, attached his right to redeem on his two mortgages to Mellen. Champney got

judgment, Dec. 1807, and in due form caused Hildreth's right to redeem to be sold to the demandant, who entered &c. Neither the officer nor Champney knew Mellen had discharged said two mortgages. Demandant nonsuit, for he goes on the two mortgages Hildreth to Mellen, as they existed at the time of his attachment, and the seizin was in Mellen, the tenant, and he as mortgagee has never been paid by the demandant.

CH. 104.
Art. 4.

§ 38. If A has title to lands, but B has an adverse possession at the time ;—A makes a conveyance to C ; this conveyance is void ; nor is the title of the grantor thereby extinguished or divested ; nor does such a conveyance enure by way of estoppel, for the benefit of B. *Brandter v. Marshall* ; 1 Johns. Ca. 85, *Jackson v Raymond*.

3 Johns. Ca. 101, *Jackson v. Brinckerhoff*.—1 Cain. 394.

§ 39. *To toll an entry*, must be a disseizin in fact, and a descent follow, by which the true owner is expelled by violence, or some act in law equivalent to violence in its effects : 2. A mere entry on the land of another is no disseizin ; it may be only a trespass. Ch. 132, a. 3, s. 2.

6 Johns. R. 197, 219, *Smith v. Bar-tis & al.*

§ 40. *Mother's entry how the seizin of her children*. A died, leaving two minor daughters by different venters. The mother of the youngest entered as her guardian in socage generally. Held, this was a sufficient seizin in the eldest to carry the descent of her moiety on her death to her heirs.

7 D. & E. 386, *Doe v. Keen*.

§ 41. A grant of lands by the general court of the late province, though depending on the king's approbation, never obtained, conveyed a seizin to the grantees, sufficient to operate as a bar to a real action under the statute of limitations.

12 Mass. R. 334.

ART. 4. *Possession*. § 1. Very often in considering conveyances, a question arises, in whom is the possession of the land, in the grantor or not, or in a third person, and is it in a privy in estate, or in one, a stranger adversely ? It therefore often becomes material to consider what constitutes possession,—and sometimes the plt. recovers the land on his possession only.

See Ch. 178, a. 23.

§ 2. In this case Lord Mansfield held, that "if no other title appear, a clear possession of twenty years is evidence of a fee simple." Plt. may recover in ejectment on twenty years' possession. 2 Salk. 421.

Cowp. 507, *Denn v. Barnard*.

§ 3. The law often annexes the possession to the right of property ; as where "two men are in possession of tenements, claiming them by different titles, he is in possession, in the eye of the law, who has the right to have possession."

2 Salk. 423.—Co. Lit. 368.—2 Cruise, 268.

§ 4. So the possession of the particular tenant is in law the possession of him in remainder or reversion. See *Goodtitle v. Newman*, a. 3, possession of an infant son.

2 Bl. Com. 290.—1 Cruise, 13.—3 Wils. 516.

CH. 104. An execution levied on lands gives possession &c. As
Art. 4. where A purchased lands on a *fieri facias*, and sold them to B, all this while there was a tenant in possession; held, B may recover the lands against this tenant, considered but as tenant at will to the purchaser, and no adverse possession. Resulting trust proved by parol.

1 Johns. R.
45, Japson
v. Sternbergh,
note.

1 Johns. R.
156. Brandt
v. Ogden.

1 Johns. R.
159, Jackson
v. Vredenburg.

1 Johns. Ca.
33, Jackson v.
Rogers.—8
East, 652.

§ 5. And to maintain a title on adverse possession, it must be adverse when it first commenced, and continue so uninterruptedly, for twenty years.

As the deed of a person out of possession is void, he may recover the land in an action brought by him for the purpose. To be out of possession, there must be adverse possession.

§ 6. Where a parol gift of land may be, and possession under it, and yet not disturb the giver's possession. As where A made a parol gift to B, and he leased the land, and A merely permitted the lessee to build and enjoy his term; held, this gift only created a tenancy at will, nor did the lease operate as a disseizin, nor prevent A devising the land, nor his devisee from recovering it without giving notice to quit.

2 Johns. R.
22, Jackson
v. Hasen.

If the plt. be in quiet possession three years, of land, and the deft. afterwards enter without colour of right, plt. has a sufficient possession to recover against the deft., considered a mere trespasser.

Co. Lit. 15,
16, 89.—
2 Salk. 421.—
3 Bos. & P.
47.—Kielw.
110.—3 Co.
42.—Co. L.
14, 15.—8 D.
& E. 211.—7
D. & E. 386.
—3 Wils. 616.
—Jenk. 243.
—Cro. Car.
411.—4 Co.
121.

§ 7. "If the father make a lease for years, rendering rent, and die, and the lessee enter, and the eldest son die before he has received any, yet the actual possession of the lessee for years is the actual possession of the eldest brother:" "so if one enter into the land as guardian in *socage*" to him. But if the father make a lease for life and die, and the eldest son receive rent and die, he is not seized or possessed of the freehold; nor has he *possessio fratris*. So is the case if he endow his father's widow of a third part, and die during the dower; for she is in possession of her husband's estate, and the son has but a mere reversion, and not a *possessio fratris*; but it would have been otherwise if his reversion depended on his own lease for life made by himself.

Co. Lit. 48.
—Dyer, 23.
—Cro. El.
322.—2 Co.
31.—13 Vin.
179, 180.

§ 8. If A have a house and two closes, and lease them to B for years, and B, his wife and children, or servants be in the house, the possession is filled by the lessee, and A has no possession whereon he can make livery of seizin of any part, though he enter into the closes; for B's possession of part is possession of all; for the impossibility that a man should be in the actual possession of every part of the land at the same time. But B's cattle or goods being on the land do not preserve his possession, because they cannot be said to continue upon the land *animo possidendi*, as the wife, children, or servants may.

§ 9. So if I deliver my chest containing papers to A, and keep the key, he has possession only of the chest and I have possession of the papers. CH. 105.
Art. 1.

§ 10. A died possessed of lands, leaving a widow and minor children, and the widow entered and kept possession. And the court in New York held, she might maintain trespass; the presumption of law being, that she entered as guardian in *socage* to her children, and was in possession by right, and she had the custody and received the rents and profits for the benefit of the heirs; that this guardianship continues till the minor is fourteen years old, and if the minor do not choose a guardian then, the former guardianship will continue. 6 Johns. R.
66, 68, Byrne
v. Van Hoes-
sen.

§ 11. Uninterrupted possession for twenty years not only gives a right of possession, but also gives a right of entry. So that if A, who has had such a possession, is turned out, he may lawfully enter and bring ejectment. So twenty years' possession forms a positive presumption. A right of possession is equivalent to a right of entry. 1 Ld. Raym.
741.—2 Salk.
421, Stokes
v. Berry.—
3 Cruise, 542.
—3 Cruise,
368.

§ 12. Possession of a guardian in *socage* is that of his ward; 1 Cruise, 14.; of one joint tenant that of all; 2 Cruise, 504, 517; so of a co-partner, 539; so of a tenant in common; 3 Cruise 410, 551, 555. 3 Cruise, 411.

§ 13. In an inquest of office by the people, if they have no title, bare possession is sufficient in the tenant, to entitle him to judgment. Case of escheat of A's estate, and proved he left an heir, no evidence deft. had his title &c.; yet as above. 5 Cruise, 217,
—3 Johns. R.
8, The Peo-
ple v. Cutting.

CHAPTER CV.

COVENANTS THAT RUN WITH THE LANDS.

ART. 1. *Covenants that run with the lands.*

§ 1. In many cases a covenant adheres to, and runs with, the land; then not merely the words, but the legal operation is to be considered, and how one has such an interest in the land as to be entitled, or liable, to the action of covenant. When a real covenant is made, by or to a man, the law gives the action to or against such of his representatives as the nature of the case requires. For instance, where the lessee makes covenants *to repair*, to the lessor, his executors, or administrators, and the lessor dies, not they, though named, shall 5 Co. 16.—1
Hen. & M.
303, 307.
Bul. N. P. 158
—Pl. Com.
290.

CH. 105. have the action, but his heir ; for the covenant runs with the land, is annexed to the reversion, and with that goes to the heir, though not named ; thus the law disposes of the covenant according to the nature of the case, and not according to the words of the instrument. See Sugden's Vendors, 400, &c. ; Cro. Car. 503, 505.

Art. 1.

Noy's Max.
108.

1 Mod. 45.—
1 Salk. 109,
199, & post.
1 Esp. 347 ;
but see post,
Ch. 116, a. 6.

§ 2. But otherwise if broken, as if this covenant had been broken in the lessor's lifetime, then a right of action, and to damages for the breach, had attached in him, and as these would be carried by the law to his executors or administrators, they alone must have had the action for them. No covenant runs with the land after it is broken ; for when broken, a right to damages for the breach attaches in the party then entitled to them, and the action ; and this right of action, and so the damages pass to his personal representatives, on his death, and while he lives this right remains in him, and passes not with the land.

Bul. N. P. 159.
Carth. 319.—
1 Lev. 215,
Jordon v.
Cowell.—
1 Salk. 81.—
Carth. 177.—
Douglass. 460.

§ 3. If A lease lands to B, and he covenants to repair, and assigns the land to C, and he dies intestate, A may sue the administrator of C, the assignee, and declare against this administrator as assignee, though not named ; for the covenant runs with the land, and binds C, assignee of it, as he in law takes the land with this covenant to repair adhering to it, and so his administrator when he takes the land.

Stra. 1221.—
1 Esp. 348.—
Cro. Jam. 319.
Cro. Car. 418
—Douglass. 462,
764.—1 Salk.
81.
1 Esp. 349,
Pitcher v.
Tooley.—1
Esp. 220, 221,
Walker's
case.—8 Co.
22, cited 1
Saund. 241.—
1 Ch. on Pl.
112.
32 H. VIII.
c. 34.

§ 4. But this legal operation does not discharge the covenant in fact ; as if a lessee covenant to repair or pay rent, and assign his term, yet he or his executor is liable on his express covenant, though the lessor have accepted rent of the assignee ; but the law binds the assignee to pay rent &c., only for the time he enjoys the estate, as he is not liable by his covenant, in fact, for he makes none to the lessor ; but is liable only on his privity of estate, and by operation of law ; neither of which can reasonably enjoin him to pay rent, repair, &c. any longer than he has the use of the estate, and he may plead that before the cause of action accrued he assigned it over.

§ 5. The common law did not give an action on the covenant to any stranger to it, or to any stranger to a condition, or any entry for a breach of it ; hence 32 H. VIII., ch. 34, was made, reciting that many had lands &c. for life, or years, by writing, containing certain agreements &c., as cited at large, Ch. 110, a. 3.

§ 6. As we have adopted the common law on this subject, and this act is a useful amendment of it, in extending just and equitable remedies, we have adopted this act ; also as far as it applies here we have practised on it.

§ 7. This act does not extend to estates tail, nor to the grantees of the reversion in a part of the land, but does to a grantee of a part of the estate of the reversion; so to him who comes in by the act of the party, though in the post, but not to him who comes in by the act of the law, or to him who is in of another estate.

The grantee may take advantage of a covenant, before he gives notice to the lessee; but not of a condition.

§ 8. This act extends to payment of rent, doing waste, and similar things; but not to conditions for delivery of corn, or paying sums in gross &c.

§ 9. By this act the privity of action is transferred, and is local or transitory. On this statute, if A lease to B, and then assign the reversion to C, and B assigns his lease to D, and C, assignee of the reversion, accept rent of D, assignee of the lessee, yet C may have covenant against B, the lessee, after the assignment; for the contract that existed between A and B, now, by operation of this statute, exists between C and B, for by the act C has such remedy as A had.

§ 10. In this case Spencer and his wife leased a house and lands, in her right to S, for twenty-one years; and he covenanted for himself, his executors, and administrators, with the plt., that he, his executors, administrators, and assigns, would build a brick wall on a part of the land leased, and S assigned his term to J, and J to the deft.; and for not building the wall the plt. sued, and on argument the court adjudged:

§ 11. First. When the covenant extends to a thing in being, *parcel* of the demise, the thing to be done by force of the covenant is appurtenant to the thing demised, and shall go with the land, and bind the assignee, though not expressly named. But when the covenant extends to a thing not in being at the time of the demise, it cannot be appurtenant; as if the lessee covenant to repair the house let, that is parcel of the contract, and extends to the support of the thing demised, and is as annexed to the houses, and binds the assignee, though not expressly bound by the covenant. But this wall was not in being, but was to be new built after; so the covenantor, his executors and administrators, are bound, but not the assignee; so the covenant is transitory, being on the express contract, and not on the privity of estate.

§ 12. Second. If the lessee had covenanted for himself, his heirs and assigns, that they would make the new wall on a part of the thing demised, the assignee should be bound, and the action against him be local; but not if assigned after the time to build the wall was expired, for then the covenant had been broken, and a covenant broken can never run with the land.

CH. 105.

Art. 1.



1 Esp. 353.—
Co. L. 215,
& post. Bul.
N. P. 160.

Co. L. 215.—
Cro. Jam. 476.
Bul. N. P. 160.

—Saund. 237.

—1 Esp. 354.

—Bul. N. P.

160.

4 Inst. Cl.

106, 106.

2 Show. 134.

—3 Salk. 48.

—Bul. N. P.

161.

5 Co. 16 to

19, Spencer's

case.—1 Salk.

199.—2 Burr.

1271.—3 Wils.

26.—2 H. Bl.

133, Tatem v.

Chaplin.

1 Esp. 346.—

3 Com. D.

244.—3 D. &

E. 210.—

Taylor's R.

82.—1 Dall.

210.—2 Har-

ris & M'Hen-

ry, 387.—12

Mod. 384.—1

Esp. 346.—3

Wils. 132.—

Moore, 159,

contra.

5 Co. 16.—3

Com. D. 244;

see Collateral

Covenants.—

10 East, 180.

—1 Penning-

ton's R. 407.

—2 Johns.

Ca. 24.—1

Salk. 199.

CH. 105. § 13. So if a warranty be made to one and his heirs and assigns by express words, the assignee shall take advantage of it. F. N. B. 312; 3 Wils. 27.

Art. 1.

F. N. B. 312.
—3 Wils. 27.

§ 14. So if the lessee for years covenant to repair the houses during the term, it shall bind his assignee by deed, or in law, as a thing that goes with the land; the assignee, and his assignee, and his executors, &c. shall have the action; for the word *assignees* comprises all assignees, their executors and administrators; the same law of the assignee of the heir of the feoffee, and of every assignee. The action against the assignee is local, because it is founded on the privity of estate.

3 Wils. 28.

Cro. El. 457,
552, Hyde v.
Dean.—1 Salk.
198, 199.—4
D. & E. 75,
Derisly v.
Custance.

§ 15. So a warranty is a covenant real, that adheres to, and runs with, the land, as to repair &c. "An assignee of the land may have covenant against the covenantor and his heirs, when the covenant runs with the land." And evidence this heir is in the land as heir, taking the profits, will support an action against him, as assignee. 1 Salk. 317; 1 Ch. on Pl. 353; Michaelson v. Cawsey, Took v. Glascock, 2 Ch. on Pl. 197.

1 Salk 317.—
2 Phil. Ev 80.
14 Johns. R.
400.

§ 16. Where "the lessee for years assigns, there is no privity of estate between him and the assignee, but only of contract." So the action between them is not local, and the remedy by the statute.

Walker's
case, 3 Co.
22 to 25.—1
Esp. 220, 348.

§ 17. Walker leased land to Harris for years, and he assigned all his interest to another. Walker sued Harris for rent behind after the assignment, and held the action lay. And in this case is given a brief and accurate statement of privities; as first, privity of estate only, as between the lessee and grantee of the lessor, or between the lessor and assignee of the lessee, for there is no contract made between them.

§ 18. Second. *Privity of contract only*, and this is *personal privity*, and extends only to the person of the lessor, and to the person of the lessee, as in Walker's case, and this remained after the assignment, and after the privity of estate ended, as between lessor and lessee.

§ 19. Third. *Privity in respect of contract and estate together*, as between the lessor and lessee themselves. If the lessee do assign over his interest and dies, for rent after his death, his executor is not liable; for by the death of the lessee the personal privity of the contract is gone.

§ 20. In all these, and like cases, where the action is grounded on privity of contract, the action is transitory; and on privity of estate, is local.

Cro. El. 436,
Nokes v. Awer.
der.

§ 21. *Covenant*. A leased to B, the deft., for years; he by his deed granted the land to C, and covenanted with him that he and his assigns should peaceably enjoy. C granted to D, he granted the term to the plt., he being ousted by a stran-

ger, brought his action. And the court held, the deed of B, the lessee, to C, for quiet enjoyment, run with the land; and that the plt., though C and D were between him and B's covenant, might have the action without shewing any deed of assignment; for as a warranty or covenant can pass only with the estate, when that passes, though by parol, the warranty or covenant passes with it; and the assignee of the estate shall have the benefit of it, if he be not assignee of the lease, by *estoppel*.

CR. 105.
Art. 1.

§ 22. This was an action of covenant against the deft., assignee of Dalton; for he, in an indenture of lease, covenanted for himself, his executors, and administrators, to leave fifteen acres, yearly, not ploughed, and he assigned to the deft., and he did not leave the fifteen acres not ploughed; the plt. demurred, because the assignee, not being named, is not bound: but the court decided he was bound; for this covenant is for the benefit of the estate, and runs with it; but a collateral covenant, as to build *de novo* &c., does not bind the assignee unless named, but the covenantor, his executors, &c.

Cro. Jam.
125, Cookson
v. Cook; &
cited 1 Esp.
347.—3 Com.
D. 244.

§ 23. This was an action of covenant against an assignee. Here the lessee of the tithes covenanted for himself and his assigns, not to let any of the farmers in the parish have any part of the tithes. Adjudged, that this covenant run with the tithes, and bound the assignee, as assigns were named, and tithes being as the land as to this covenant. In this case the court cited several authorities as good law, already stated, and these further of covenants running with the land. Further from Spencer's case. If a man demise or grant to a woman for years, and the lessor covenant with her to repair the houses during the term, and she marries and dies, the husband shall have covenant as well in law, on demise or grant, and on an express covenant. The same law of a tenant by statute-merchant, statute-staple, or *elegit of a term*. So if one take a lease for years, in execution, he shall have covenant, as a thing annexed to the land, though he come to it by an act in law. As if a man grant to a lessee for years, so much *estovers* as shall be sufficient to repair his house, or burn in it, &c. during the term, it is appurtenant to the land, and runs with it, into whatever hands it comes, though "tenant by the *curtesy* or any other who comes in in the *post* shall not vouch, which is instead of an action." Other cases cited. And if lessee for years covenant to repair, it binds all others; all as well those who come in by act of the party, as by act in law.

3 Wils. 25,
Bally v. Wells.
—1 Esp. 352.
—3 Com. D.
244.

3 Wils. 28, 29.

§ 24. "There must always be a privity between the plt. and deft., to make the deft. liable to an action of covenant; the covenant must respect the thing granted or demised; when the thing to be done, or omitted to be done, concerns

executor of the lessee, and for a breach after assignment ; for it is a covenant in fact, and runs with the land, and the lessee, by his own act, cannot discharge himself. But for covenant in law, see a preceding article. CH. 105.
Art. 1.

§ 32. A covenant to *lime and dung* the land, runs with it, and the heir of the lessor may have covenant for a breach after descent ; this covenant would go to the assignee without being named. So to discharge the lessor of all charges, ordinary or not, is a covenant that runs with the land. So a covenant to reside on the demised premises, during the term, runs with the land, and binds the assignee, though not named. So to repair the house that is demised. Anstr. 413, Braver v. Hill. 10 Mod. 168,
Sail v. Kitch-
ingham.—5
Co. 24.—2 H.
Bl. 133, Ta-
tem v. Chap-
lin.—8 Com.
D. 244.—5
Co. 16, 17,
24.—Dyer,
13.—Cro. El.
467.

§ 33. So covenant lies against the assignee of the lessee for a part of the rent, as in such case the action is on the real contract, in respect to the land, and not on a personal contract. And an eviction of the rent may be apportioned ; but not on covenant against the lessee himself, who is liable on his personal contract which is entire. 2 East,
575, Steven-
son v. Lam-
bard, cited 1
Ch. on Pl. 112.

§ 34. If the first assignee, *bonâ fide*, assign to a second assignee, he is in possession, and liable in law to an action of covenant, before actual entry, and while the first remains in the estate ; for “ by the assignment the title and possessory right pass, and the second assignee becomes possessed in law,” unless the assignment be fraudulent. 1 Esp. 350,
Walker v.
Reeves.

But in this case the court was of opinion that fraud is not to be imputed to the assignee, where he does not continue in possession. As to covenant running after broken, see Ch. 115, a. 6, s. 2. 1 Bos. & P. 21,
Taylor v.
Shum.

§ 35. This was covenant broken by an assignee of one Bartlett, who had a covenant from the deft., that the land was free from incumbrances ; and held, it was founded on privity of estate, and ran with the land, and therefore the action was local ; but otherwise if founded on contract, it then had been transitory. 6 Mass. R.
331, Lienow
v. Ellis.

§ 36. Held in this case, that after a covenant has passed with the land, from the plt. to his assignee, he cannot recover in covenant broken, without shewing he, the plt., is answerable to his said assignee ; for one who has assigned the land cannot be evicted ; he cannot sustain any damages unless answerable to his assignee. 7 Mass. R.
444, Niles v.
Sawtell.

§ 37. A grantee of a reversion on a lease for years, may have covenant for rent, against the lessee, after he has assigned his term, and though he assigned the term before the reversion was granted ; 3 Salk. 4, assignee is liable to all covenants that run with the land ; but to make the covenant run 3 Salk. 6,
Parker v.
Webb.—
1 H. Bl. 562.
—1 Yeates,
74, Dunbar v.
Jumper.—
6 East, 289.

CH. 105. with the land, there must be a privity between the parties of estate. See *Webb v. Russell*, 3 D. & E. 393, 678.

Art. 2.



ART. 2. Covenants that run not with the land &c.

3 Wils. 25,
Bally & al. v.
Wells—Ch.
on Pl. 10, 24,
36, 38.

§ 1. In this case it was allowed to be law, that the opinion of Coke, before stated, to wit: that if the lessee covenant to build a wall *de novo*, on the leased premises, and do not name his assigns, the assignee is not bound.

1 Esp. 347.—
3 Wils. 25.—
6 Co. 16, in
Spencer's
case.

§ 2. The assignee is not bound if the thing to be done be merely collateral to the land leased; as if the lessee covenant for himself and assigns, to build a house on the lessor's land, not leased, or not parcel of the demised premises, or to pay any collateral sum of money to him, or to a stranger, this shall not bind the assignee.

3 Com. D.
245.—3 Salk.
48.—1 Esp.
362.

§ 3. So if cattle or goods be leased for any time, and the lessee covenant for himself and his assigns, at the end of the term, to deliver them up &c., and assign them, the assignee is not bound; for it is merely a thing in action, in the personality, and wants such privity as is between the lessor and lessee of land, in respect of the reversion, and hence runs not with the estate.

2 Mod. 138.
—Bul. N. P.
161.

§ 4. So covenant runs not with the use. As if A grant a rent charge to B to my use, to have to B, his heirs and assigns to my use, and covenant with B to pay the rent to my use. B may sue for the rent behind; this is the legal construction of all contracts to one man to another's use, except where the statute of uses operates; there the covenant goes with the land to the use.

Dougl. 183,
Holford v.
Hatch.—
1 Esp. 327.—
Dougl. 461,
Walker v.
Reeves.—
1 East, 502.—
Dougl. 57.

§ 5. Nor does covenant run against an under-lessee. As if A lease to B, and he covenant to pay rent, then B under-leases to C for a day or two less than the lease; A cannot have covenant against C on the covenant in the original lease, for C is not substantially an assignee; for to have the action against C he must be assignee of the whole term. But if there be an absolute indefeasible assignment of the whole interest in the term, covenant lies against the assignee by the assignee of the reversion. See a. 1, s. 27; 2 Phil. Evid. 90.

Dougl. 454 to
461, Eaton v.
Jaques.—
1 Esp. 360,
361.

§ 6. So covenant runs not against a mortgagee not entered. As where A, lessee, mortgaged his term; the court held, that the lessor could not sue the mortgagee as assignee of the interest and title, unless he had taken actual possession; the mortgage being forfeited is not sufficient. In this case the mortgagee pleaded, that all the estate, title, &c. of the lessee (for twenty-one years) did not come to and vest in him by assignment thereof, and that he was not possessed of the term &c. and issue joined, and judgment for him.

§ 7. So covenant never runs with the land after it is broken. So not against the assignee, though named. As where the lessee covenanted to pull down certain old houses and build others within seven years; he did not perform his covenant, and at the end of the seven years he assigned to the deft.; the court held, he was not liable, "the breach being complete before the assignment." *Southwark v. Smith*, except however, if the damages continue, this rule in certain cases may be dispensed with; as where the lessor takes a covenant to repair, and there is a breach for want of repairs, and then he dies, his representative may bring covenant for the breach and the breach in his time together, for he recovers damages sufficient to put the buildings into repair, not strictly damages for the first breach.

CH. 105.
Art. 2.

1 Esp. 347,
Greecot v.
Green, cited
from 1 Salk.
199.—1 W.
Bl. 351.—
3 Burr. 1271,
1273.—
3 Com. D.
245.—1 Salk.
141, *Vivian*
v. Campion.

§ 8. As the assignee comes in only in privity of estate, he is liable only while in possession. He may plead, "that before the action was brought, or the cause of action accrued, he had assigned over;" for the assignee is only chargeable in covenant for a breach committed while in possession, not for a breach after assignment; nor is the assignee liable after assignment, though he remain in actual possession, as the possession in law is in the second assignee by virtue of the assignment, and he is liable as above.

Dougl. 441.—
4 Esp. 349,
351, *Pitcher*
v. Tooley.—
1 Salk. 81.—
Dougl. 736,
Chancellor v.
Pool.—
3 Com. D.
243.—*Jones*,
223.—*Dougl.*
461, *Walker*
v. Reeves.
3 Com. D.
243.—*Jones*,
223.

§ 9. So a covenant in law, after the assignment of the term and rent accepted of the assignee, covenant does not lie against the assignor for an express covenant.

§ 10. A collateral covenant runs not with the land; as where a covenant is about some collateral thing, not immediately or at all concerning the thing granted, as to pay a sum of money in gross, to build a house on the land of another, to make a lease or grant of other land, to give other security to perform the covenants or to pay the rent, or that the lessor shall distrain for the rent in some other land than that which is demised, &c.

3 Wood's
Con. 495.—
5 Co. 16.—
3 Com. D.
244.

§ 11. And the lessee is not excused the performance of his covenant collateral to the land by the entry of the lessor: as if the lessee for years covenant to convey water standing on the land before such a day; and after the lessor enters before the day, and continues there till the day is past.

3 Wood's
Con. 432.—
5 Vin. 244.—
Style, 265.—
Cro. El. 374.

§ 12. So a covenant not to assign without the lessor's consent, is collateral, and not discharged by his entry into the land, or a part of it.

3 Wood's
Con. 533,
589.

§ 13. So if A covenant to pay £300 a year to B, so long as he and his wife live separate, and by an after deed B covenant to indemnify A from paying the £300, so long as B and his wife cohabit; B's covenant is collateral, and no bar to the action on the other, but A must have his remedy by action of covenant on this collateral covenant of B, if A be sued on the first.

2 Vin. 218.—
5 Com. D.
608.

CH. 106. § 14. B, tenant in tail-male, leased to A for ninety-nine years, A assigned over to C, but before this was done B died, without issue male ; held, no action of covenant on the lease lay by the assignee against the representatives of B, as the lease was void when assigned and no interest passed under it. A's right of action he could not assign. No interest passed for the covenant to run with.

Art. 1.
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New Rep.  
158, Andrew  
v. Pearce.

10 East, 130,  
139, Mayor &  
al. of Congle-  
ton v. Pattin-  
son & al.

§ 15. Covenant on an indenture ; a lease of ground with liberty to make a watercourse and build a mill ; and the lessee covenanted for himself, his executors, &c. and assigns, not to hire persons to work in the mill settled in other parishes, without a parish certificate. Held, this covenant did not run with the land, or bind the assignee of the lessee, for this covenant did not affect the thing demised, but was altogether collateral to it and distinct from it.

Roach v.  
Wadham,  
6 East, 289,  
306.

§ 16. To make the covenant run &c. the privity of the parties covenanting must continue, as if B is a party, and C does not take his estate but by a power above, the covenant runs not as to C, *Tempest's case*, *Clayt. 80* ; *Glover v. Pope*, 1 *Show. 284* ; *Hurd v. Fletcher*, *Dougl. 43, 45*.

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## CHAPTER CVI.

### COVENANTS BINDING ON HEIRS, EXECUTORS, ADMINISTRATORS, WIVES, ASSIGNEES, &c.

ART. 1. *General principles.* The operation of a covenant in law is often different from the words used. As where a party in his covenant by its words binds certain representatives of his, as his administrators, executors, heirs, assigns, &c. yet if such a covenant cannot have effect according to the right and interest, it binds not such person. So on the other hand, generally when a man covenants for himself, not naming executors, administrators, &c. yet they are bound, and an action of covenant lies against them ; for they, named in the contract or not, are bound to perform his personal contracts, the performance of which is not confined to his own acts. In other words, wherever the deceased's covenant does not die with him, his representatives are bound to perform it, and

so may take advantage of one to him, unless this covenant be annexed to some estate, and run or pass with it into other hands, as the assignee's &c. CH. 106.  
Art. 2.

ART. 2. *Executors and administrators.* § 1. The general principle is as before stated, that they are bound by the covenant of the testator or intestate in all cases, even though not named, except it be personal, and to be performed by him only. And wherever the covenant is broken in his time, immediately on the breach of it a right of action and of damages accrues to, or against, and vests in him, and, as a *chose in action*, passes to executors and administrators who represent his person; and so an executor or administrator is an assignee. 3 Com. D.  
240, 243.—  
1 Bac. Abr.  
533.—48 Ed.  
III. 2.—Cro.  
El. 553.—  
2 Mod 268.

§ 2. A covenant merely personal goes exclusively to the executor or administrator, and covenant lies against him only. As if A covenant that B shall serve D as an apprentice for seven years, and dies, and B departs within the time, covenant lies against A's executor, and though not named in the covenant. For when he covenants to do a thing that may in its nature be done by his executors or administrators, they are bound to perform, though not named in the contract. So they have the benefits as *plts.* on the same principle, though not named; and if named, they have it not, if the thing be not of a nature to appertain to them, as in the above case of a covenant to the lessor, his executors and administrators to repair the leased premises, and he died, and the court held, that not his executors or administrators, but his heirs should have the action for a breach of this covenant after the lessor's death, for it runs with the reversion to the heir, and so does a covenant for further assurance &c. 3 Com. D.  
243.  
1 Esp. 357.—  
Bro. title  
Cov. 12.—  
1 Bac. Abr.  
553.

§ 3. But if the covenant be broken in the time of the testator or intestate, his executor or administrator has the action, though the covenant be of a nature to run with the land, and heirs and assigns only are named in it. As where the *plt.* sued as executor, and declared the *deft.* sold the *plt.*'s testator certain lands, and covenanted with him, his heirs and assigns, that he should quietly enjoy against him and Sir P. Vanlore, and all claiming under him, and assigns a breach, that one claiming under Vanlore had ejected the *plt.*'s testator; it was objected, that the action should have been brought by the heir or assignee as being named, and as this covenant was of a nature to run with the land, but it was adjudged for the *plt.* as the eviction was in the testator's lifetime, and the covenant then broken, and as then he could not have an heir or assignee. Espinasse, however, makes a *quare*. But the principle above stated is a sound one, for the moment the covenant was broken, and a right or *chose in action*, and a right to damages in their nature personal vested in the testa- 2 Lev. 25,  
Lacy v. Livingston.—  
3 Com. 240,  
245.—1 Esp.  
356.—1 Bac.  
Abr. 533, 534.  
—Bull. N. P.  
158, 159.—  
2 Burr.  
1271.—2 Bos.  
& P. 565.—  
2 Mod. 138.—  
3 Bos. & P.  
300.—  
3 Johns. R.  
263, Bennett  
v. Irwin.

CH. 106. tor, and on his death passed to his personal representative,  
 Art. 3. his executor.

§ 4. Executors and administrators also, may be charged as such or as assignees. As where lands come to them, they may be charged for a breach in their own time, as non-payment of rent, not repairing &c. either way. But if sued as assignees they are charged as *tertenants*, and the judgment is *de bonis propriis*; if as executors or administrators, *de bonis testatoris*, though the breach be committed in their own time, as for repairs, for instance. For when sued as executor the deft. is liable only in virtue of the testator's covenant, and the plt. elects to sue the deft. as executor, and then he must have judgment accordingly. But covenant does not lie against an executor or administrator on a covenant in law, not broken until the death of the covenantor, nor if the covenant be for the personal act of the testator or intestate, if the breach be not in his lifetime, for it ending with his life there can be no breach after his death; but for one before his death an action accrues and vests. And the assignee in fact, as one named, or in law, as executor, has covenant whenever it runs with the land, as to pay rent, not to commit waste, to leave the estate in repair, to make wall on the land, to enter to view the repairs, to make new leases at the expiration of the old one; but otherwise, in regard to covenants not running with the land, as collateral covenants or upon possibilities.

No case is to be found of an action by an assignee against an assignor, on a covenant in law, for an eviction in consequence of an act done by the lessor. But many cases are found of actions by assignees against assignors, on express covenants.

#### ART. 3. *The heir.*

§ 1. As to the estate, the heir has the action by reason of the reversion and injury to it. As where the lessee for years covenanted to repair, and leave in repair, the court held, that the heir should have covenant on this contract, though not named in it; for it was a covenant that ran with the estate, and so should go with the reversion to the heir. See 3 Com. D. 240.

§ 2. A lessee mortgaged his term, and "covenanted for himself, his heirs, executors, administrators, and assigns," to pay £280 and interest, (the debt,) in six months; the court held, that covenant lay against the heir, because named; and it is not necessary for the plt., in his declaration, to allege that he had assets by descent; if he had none, he must plead this.

§ 3. So where the covenant relates to the inheritance, the heir must have the action on it. So if A covenant with B and his heirs to make such an assurance.

1 Esp. 367,  
 Tilney v.  
 Norris.—Salk.  
 309.—3 Com.  
 D. 243.—Ld.  
 Raym. 554.—  
 1 Salk. 317,  
 Buckley v.  
 Perkins.—  
 Hob. 118,  
 Collins v.  
 Thorough-  
 good.—  
 3 Com. D.  
 242, 243.—  
 2 Bl. R. 866.

1 Esp. 355.—  
 2 Lev. 92,  
 Loughfer v.  
 Williams.—  
 Skin. 306.—  
 1 Salk. 141 —  
 Where bound  
 in equity,  
 though not  
 named, New.  
 on Con. 84,  
 85.  
 1 Bac. Abr.  
 533.—Willes,  
 586. Dyke v.  
 Sweeting.—4  
 Cruise, 69.—  
 2 Lev. 22.  
 3 Com. D.  
 240.

§ 4. So in covenant that runs with the land, as for quiet enjoyment, evidence that the deft. is in as heir will support the declaration, charging him as assignee; the plts. stated, "that the reversion came to, and vested in the deft., by assignment thereof." As if A lease land to B, and covenant, he shall quietly enjoy; B is ousted, A dies, and his heir enters, being in the land, and this covenant running with it, attaches to him, and he is liable to an action on it, as assignee of the land.

CH. 106.  
Art. 3.

4 D. & E. 70,  
78, Derisley  
v. Custance.

§ 5. But as by our law the whole estate of the testator or intestate, is in the hands of the executor or administrator, to enable him to perform all the contracts of the deceased, and his heirs have no property of his, but such as his executor or administrator can, by license of court, take from them to pay debts &c., a question has been made, and very properly, if they ever ought to be sued. This will be considered in a subsequent article. If the lessee, A, under-lease a part of the term to B, reserving rent, not noticing the original lease; this under-lease is like the original lease, and A may have debt for rent against B, or distrain. A bare assignment is different.

In Virginia the heir may sue, and be sued, on his ancestor's covenants of warranty, if he have assets &c. As where the heiress of one Catlett brought an action of covenant against Woodford, the heir at law of W. Woodford, on certain indentures of lease and release, from Woodford to Catlett, whereby Woodford conveyed to Catlett 300 acres of land, fully to include that quantity, with general warranty, covenants for peaceable entry, quiet enjoyment, and general indemnification against claims and suits: the declaration, in the usual form, stated the indentures, Catlett's entry, seizin, and death; and that Woodford bound himself, and his heirs, to Catlett, his heirs, and assigns, for the performance of the several covenants in the indentures; then it stated, that "the lands, covenants, and writings, aforesaid, with all their rights, members, and appertenances, descended to the plt.;" plt. then averred the deft. was the heir of W. Woodford, and that assets to more than the value of £100 descended to him from said W. Woodford: breach assigned was, that W. Woodford and the said deft. did not keep their covenants, but broke them in this, that the said tract of land did not contain 300 acres, but only 280 acres; also in this, that they have not warranted and defended the plt., and those under whom she claims, and their assigns from all claims, nor kept them harmless, and in quiet enjoyment; but for want of title they were prevented from taking possession, and had been evicted: after *oyer* the deft. pleaded that he had not broken the indentures; and is-

1 Hen. & M.  
303, Wood-  
ford's heir v.  
Pendleton.—  
2 Wash. 155,  
Harrison v.  
Payne.—See  
Cohoons v.  
Purdie,  
3 Call, 431.

CH. 106. sue; jury found the deft. had not performed, but had broken his covenants, as the plt. had alleged, and assessed damages £70 : deft. filed errors in arrest of judgment, and assigned the plt. had not shewn she was heiress at law of Catlett, or that she was entitled to this action under him : judgment for the plt. ; affirmed on appeal ; real objection, she had not stated how she was heir ; held, cured by verdict : 2. So the deft. had not broken his covenant, saying nothing as to the breach by his ancestor was well enough after verdict, finding the deft. had broken his covenant : 3. If the declaration allege the heir has assets by descent, if he fail to plead he has no assets, or does not state them in particular, the jury need not find assets ; at most only a title defectively stated.

Forms in pleading by and against heirs and devisees, referred to in sundry cases and authors. 10 Wentw. Index, 58 to 60.

#### ART. 4. *Husband and wife.*

1 Esp. 358,  
Beaver v.  
Lane.—Stra.  
229, Aleberry  
v. Walby in  
error.—Am.  
Prec. Joinder  
in Action,  
Husband &  
Wife.—5 Co.  
17.

§ 1. When the covenant is to both, he alone may bring the action. See her warranty considered in a subsequent article. A and B were tenants in common in land in fee, and B married, and after her marriage she and her husband and A leased the land at will, to the deft. reserving rent ; the wife and her husband and A sued for the rent. And it was objected that she could not join, for she can join only in what will survive to her, or her administrator, after her husband's death ; here the husband is fully entitled to the rent incurred during the coverture, and if she die, his, and not her, administrator shall have it ; and as it is a lease at will, it is not within the 32 H. VIII., ch. 28. But the court held, that the husband and wife may, or may not, join in this action, at their election, as where a bond is to both of them. Here the rent was reserved to both. But if a *feme* lessee take husband, he shall have covenant on the covenant in law.

Wootton v.  
Hele, 1 Mod.  
291.—Pow.  
on Con. 108 ;  
cites 44 Ed.  
III. 38.—2  
Saund. 177.  
—Many cases  
cited, Reeve's  
D. R. 110.—1  
Mod. 191.—2  
Roll. Abr.  
684, 703.—1  
Ch. on Pl.  
111.

§ 2. *Covenant on her covenant made while covert.* The husband and wife levied a fine, and added a warranty. The husband died ; and in action of covenant against the wife, it was said that she was not bound by her covenant in a fine, levied by her when covert. It was admitted, that as she could levy a fine, it might work by *estoppel*, and pass against her. But to make her liable to a personal action thereon, to answer damages &c., was hard, and a case of the first impression. But for the plt. it was urged, that covenant lay on this warranty ; for the law enabled a *feme covert* to corroborate the estate she passes, and to do all things incident. If she levy a fine of her inheritance, she may be vouched, or a *warrantia chartæ* lies against her. And the court held, that this action of covenant lay against her, as she was empowered

to do the principal act, to pass the estate, her covenant was incident ; and she is also examined.

Ch. 106.

Art. 5.

§ 3. In this case it was held, "an agreement entered into by a *feme covert* jointly with her husband, for the benefit of her estate, will bind her." But she cannot covenant to convey, as she is not examined as to this ; but her covenant to levy a fine of a trust estate is good. Reeve, 111.

Reeve, 110.

§ 4. In this case it was decided, that a married woman, living separate from her husband, and with a separate maintenance, and there is a covenant that he shall join in her conveyances to make them valid, yet she may surrender copyhold lands, without his joining, and without a special custom for that purpose ; for by his agreement he had renounced his interest in her land ; *cessante ratione, cessat et ipsa lex*. And this surrender is like a fine levied by her alone, which *estops* her and her heir, if her husband do not avoid it.

Hen. Bl.

334, 351,

Compton v.

Collinson —

Rothwell v.

Bedrington.

§ 5. But if the wife covenant without her husband's authority, with a maid servant, it is void, and the maid servant may have *assumpsit* against him for her services.

6 D. & E. 176,

White v.

Cuyler.

See the wife's warranty, post ; and her covenant and warranty examined.

#### ART. 5. *Assigns and assignees.*

§ 1. On all covenants in fact, or on all *express* covenants, an action lies against the covenantor, or his executors ; though where they run with the land, the action may be also against the assignee ; for the covenantor has his election in such covenant, to charge him, or the covenantor himself, though he has accepted rent of the assignee ; but in covenant in law, the acceptance of rent of the assignee discharges the assignor.

3 Com. D 243.

—Jones, 223.

1 Sid. 447.—

4 Ins. Cl. 102.

—2 Cruise,

53 —4 Cruise,

72, 76.

§ 2. The word *assignee* is indifferent to *assignee in deed*, or in law ; and when the executor takes, he takes to the use of the testator, and is assignee in law. But assignee in fact, includes an assignee in law ; as where A gives a bond to B, to pay £10 to such a person as B shall appoint by his will, the appointee is an assignee in fact, and the executor or administrator of B is not this assignee ; for when any thing testamentary is covenanted to be done, to one and his assigns, this is to be done to his executors, when there is no actual assignee, but not when one is intended.

Hob. 9, 10,

Pense & al.

exrs. v. Mead.

§ 3. In construction of law, every one is an assignee, who is in possession of the whole estate of the lessee, however he comes by it. Hence it has been holden that an occupant is an assignee in law to the first lessee ; for he claims by a *que estate* from the lessee ; he in law becomes subject to pay rent, to waste, to forfeiture, &c. ; and so is a devisee, an executor,

3 Wood's

Con. 506, 508.

—1 Cro. 26.

**CH. 106.** or administrator, or husband of his wife's term, an assignee  
**Art. 5.** in law.

§ 4. Many cases in which assignees may sue or be sued on covenants, have been already stated in the preceding article. It is a general principle, that the assignee can sue or be sued only when the covenant runs with the land or estate, and this is only with real estate, and never when the covenant is broken before he comes into the estate; hence, though he be named in the original covenant, yet if broken before assignment, no action lies against him, as in the case of the old houses before stated; nor is he ever bound unless he is assignee of the whole term, as in *Holford v. Hatch*, above; nor is the mortgagee ever assignee, before he has actual possession,—and see *Eaton v. Jaques*.

1 Esp. 347,  
 Grescot v.  
 Green, Salk.  
 109.—1 W.B.  
 351.—2 Burr.  
 1271.—Doug.  
 174.—2  
 Cruise, 114.  
 —4 Cruise,  
 69, 76.

§ 5. By assignment the lessee parts with his whole property, “and the assignee stands, to all intents, in the place of the assignor.”

2 Bl. Com.  
 326, 327.

§ 6. By common law, on a covenant in law, the assignee of the estate has an action: so tenant by statute merchant &c. who comes to the land by act of law: so if the assignment be by parol, where it may be good by parol. So tenant of a term by execution is assignee.

5 Co. 17.—4  
 Co. 80.—3  
 Com. D. 241.  
 —4 D. & E.  
 401.—1 Esp.  
 352, Nokes v.  
 Awder.  
 Cro. Car. 503,  
 506, Middle-  
 more v. Good-  
 ale.—4  
 Cruise, 80.

§ 7. So an assignee shall have the advantage of further assurance, if named, on a covenant relating to the estate, by the common law; as where A covenanted with a purchaser, his heirs and assigns, to make further assurance. As where the deft., by indenture, infeoffed J. S., his heirs and assigns, to make further assurance upon request; these lands J. S. conveyed to the plt.; on the plt.'s request, the deft. refused to levy a fine; the plt. brought an action of covenant, and the deft. pleaded the release of J. S., dated after the action was commenced; the plt. demurred: and it was adjudged, 1. That this covenant goes with the land; and the assignee, at the common law, or at least by the 32 H. VIII. shall have benefit of it: 2. That though the breach was in the assignee's time, yet if the release had been by the covenantee, (a party to the deed under which the plt. claims,) “before any breach, or before the suit commenced, it had been a good bar to the assignee;” but the breach being in the assignee's time, for not levying a fine, and the action brought by him, and so attached in his person, the covenantee could not release the action wherein the assignee is interested: but at another day, because the conveyance was to the husband and wife, and to his heirs, and the plt. did not join his wife, then alive, judgment was against him.

§ 8. So the assignee has covenant against the lessee or his

3 Com. D. 241,  
 242.—1 Esp. 354.—2 Show. 134.—5 Co. 17, case of Spencer.

executor for rent due after the assignment and acceptance of rent of the assignee ; for the assignee of the reversion has by the statute the advantages of the assignor. And where the assignee has covenant, it extends to one in fact and in law, and to an assignee of an assignee, *toties quoties* ; to the executor or administrator of an assignee, and to the assignee of an executor or administrator.

CH. 106.  
Art. 6.

§ 9. So the assignee may have covenant on any covenant that concerns the land, as to pay rent ; so not to do waste, to leave the land in good repair at the end of the term, to make a wall upon it, to enter to view repairs &c. ; but not upon collateral covenants, or upon a lease good only by estoppel, nor for a breach before his time : otherwise, where the breach is continuing ; as if the covenant be to repair on notice, and the lessee does not repair on notice by the assignee, covenant lies, though out of repair before the assignment ; for in this case the breach is, by the strict rules of law, on the notice given.

Cro. El. 600.  
—Cro. El.  
437.—8 Mod.  
72.—1 Bac.  
Abr. 634 to  
639.—4 Mod.  
71.

§ 10. If an estate be made to one and his heirs, omitting assigns, yet he may assign, for the law includes assigns in the word *heirs*. If the lessor assign his rent without his reversion, and the lessee agree, the privity of contract is assigned, and the assignee may have an action of debt.

5 Wood's  
Con. 25.—  
3 Salk. 118.

If A lease to B, paying rent, and B covenant to pay it, and afterwards B assigns to C, and A grants his reversion to D, and D accepts rent from C, yet for rent due at another day D may sue B on his express covenant.

3 Lev. 233

ART. 6. *Assignee of part.* § 1. How far an assignee of a part of the land or of the estate may sue or be sued, is a question that does not appear to be fully settled.

§ 2. In Co. L. 385, a distinction is made between a part of the *land* and a part of the *estate*. Thus, "the assignee of a part of the land shall vouch as assignee ; but an assignee of a part of the estate, as lessee or donee shall not." This authority is consistent with the principle before stated ; that is, that one holding part of the land shall vouch, but there shall not be two or more vouchers as to the same part or piece, as one by tenant in tail, and another by tenant of the freehold.

§ 3. In this case is cited *Palmer v. Edwards & al.* ; here the plt., assignee of a part of the demised premises, sued the assignee of the lessor for not finding timber for repairs. The declaration stated that Richard Edwards, A. D. 1751, demised (among other things) the premises specified (in which he had a term) to Edmonson, his executors, administrators, and assigns for thirty years ; that Edmonson covenanted to repair the premises, (among other things) ; that Richard Edwards, the lessor, covenanted for himself, his executors, administrators, and assigns, to find timber to repair the prem-

Dougl. 182,  
Holford v.  
Hatch.

**CH. 106.** *ises (among other things ;)* that Edmonson, the lessee, entered &c. and January 1752, assigned to one Warner, his executors, administrators, and assigns, the said premises specified for thirty years ; that Warner entered &c., so several assignments till the premises came to the plt. ; and Richard Edwards assigned his reversionary leasehold interest to the defts., and they did not find the timber. Buller and Willes, justices, held, that the defts., as assignees of the reversion, might sue Palmer as assignee of the term on the privity of estate ; that is, assignee of part ; and that the remedy is mutual, so as to entitle Palmer, assignee of part, to the advantage of the original covenant on the part of the lessor.

**3 Wood's**  
**Com. 524.—**  
**Cro. Car. 221,**  
**222, Cong-**  
**ham v. King.—**  
**Jones, 245.—**  
**1 Vent. 411.—**  
**1 Esp. 350.—**  
**4 Cruise, 68.**

§ 4. An action of covenant was brought against the deft. as assignee of an assignee, for not repairing a house let (among other things.) Issue was joined on a mean assignment of a lease laid in the declaration. Verdict for the plt. ; and motion in arrest of judgment, objecting that the plt. stated the lease to be to J. S., and by him devised to J. D., and made J. N. his executor, and he entered and assigned to W. S., and he entered and assigned one house, parcel of the premises, to the deft., who entered and made spoil in a chamber &c. parcel of the demised premises &c. ; one exception was, that the breach was assigned in such a house, parcel of the premises, so the deft. is but assignee of parcel of the things demised, so not chargeable with this covenant. But the court held, that " this covenant is divisible and follows the land," and the deft. is chargeable by common law, or by the 32 H. VIII.

**3 Wood's**  
**Con. 524.**

§ 5. So if the lessor had granted the reversion of a part to one, and other part to another, they might have brought covenant against the assignee of the lessee for years who was administrator.

**Hob. 25, Roll**  
**v. Osborn.**

§ 6. Hobart says, " the warranty must remain entire, as it was created, without a voluntary division of the party ;" a warranty is a covenant real. A question arises, what is a voluntary division ; he adds, if lands be given to two jointly with warranty, and " one makes a feoffment of his part, he hath lost his warranty ; but the other may vouch for his moiety." If they make partition, they lose it, Co. L. 385, and " if one make a joint feoffment with warranty, and the joint-tenants make partition by consent, the feoffor shall not be bound to warrant the divided estate." *Idem.*

§ 7. But a warranty to one, his heirs and assigns, is to *all* his heirs and to *all* his assigns ; and taken, as it may be, most strongly against the warrantor, it is to them as owning the land entire or in divided parts. If the warranty, originally one entire contract, be apportioned, and the owner of any part of the

warranted land be allowed to claim the warranty or covenant as to that part, it does not seem to be dividing one's contract against his consent; for by it the warrantor seems to engage to defend the land to the heirs and assigns, jointly or respectively.

CH. 106.  
Art. 6.

§ 8. The first clause in the 32 H. VIII. "extends to grantees of part of the estate of the reversion, but not to the grantees of the reversion in part of the land."

Bull. N. P.  
160.

§ 9. This was a declaration against the deft. as assignee of all the estate. The evidence was, that he was assignee of a part only. The court held, that this was a fatal variance, for he is liable only from the privity of estate, and so must be charged according to the truth of the case. No objection was made that the deft. was assignee only of a part of the land. But the grantee of the reversion may have debt against the original lessee for the whole rent, though he has assigned over part of the premises; for the privity of contract for the whole rent remains against the lessee.

Cowp. 766,  
769, Hare v.  
Cator —  
3 Com. D.  
245.—Cro.  
El. 633,  
Broom v.  
Hore.—  
2 Phil. Evid.  
89, 90.

§ 10. One may be assignee, though a part of the time, as a day, be reserved. As where a proviso was, "that the lease should become void in case the lessee, his executors, or administrators, at any time during the term, set, let, or assign over the said hereby demised messuage or dwelling-house, or any part thereof;" and lessee's administrator demised for a term, which fell a day short of the expiration of the original lease, this was held to be within the meaning of the proviso.

Dougl. 57,  
Roe v. Harri-  
son.

§ 11. But an underlease for a part of the time is not a breach of the covenant not to assign; as where a lessee for twenty-one years underleases for fourteen years. And it is no assignment of the original lessee to reserve the rent to himself on granting over, though he parts with the whole term. So it is no assignment to devise the term; nor passing it in case of a bankruptcy; nor being in debt, and confessing a judgment whereon the term is taken in execution. Sugden's Vendors, 58; 1 Vent. 36.

3 Wils. 224,  
Crusoe v.  
Bugby, cites  
Stra. 406,  
Poultney v.  
Holmes.—  
Style, 483.—  
4 Cruise, 161.

§ 12. *The manner of performing a covenant as to assigns.* If A covenant to do a thing to J. S. or his assigns, or to J. S. and his assigns by a day, and before that day J. S. dies, it must be performed to his assigns, if before that day he names any assignee; and if he names none, then to his executor or administrator, who is an assignee in law.

3 Wood's  
Con. 547.—  
27 H. VIII. 2

§ 13. The law now so far protects an assignee of a debt, that if the obligee assign it, and after notice thereof the obligor takes a release from him and pleads it, the court will set it aside on motion, or the plt. may reply the special facts.

1 Bos. & P.  
447.—7 D. &  
E. 666, Craib  
v. D'Aeth.

§ 14. *Assignee of a lessee cannot have covenant against him on any but his express covenant.* As where Daniel Parker

Essex, Nov.  
1787, Waldo  
v. Hall.

Чл. 107. leased by indenture to Hall, the deft., certain lands ; he assigned to the plt., Waldo, in these words, " grant, bargain, sell, assign, and set over to said Waldo, his executors, administrators, and assigns, the whole of the premises and appurtenances within mentioned, to have and to hold during the term of time in said lease mentioned, he the said Waldo performing all covenants" &c. Prior to this lease, Parker had mortgaged these lands to one Fitch, who after the assignment ejected Waldo by virtue of said prior mortgage ; and for this eviction he sued Hall in covenant on his assignment, as importing a covenant in law, that Hall had power to demise and assign ; and that Waldo should hold against all holding under Parker & Hall. On demurrer to this declaration, held, no such covenant was implied, but Hall merely put Waldo in his place, and Waldo's remedy, if any, was against Parker on his covenant in his lease that run with the land, for any acts done by him &c. The assignment transferred the privity of contract so as to exist between Parker and Waldo, which before existed between Parker and Hall.

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## CHAPTER CVII.

### COVENANTS, JOINT AND SEVERAL.

4 Cruise, 67. ART. 1. *English rules and cases.* § 1. A covenant to many and jointly, as "with and to them together, and to *quolibet eorum*," is construed by the interest it passes ; that is, if each of the covenantees hath or is to have a several interest or estate ; there, though the words be joint, each shall have a several interest under the words, "*cum quolibet eorum*." But where the interests are not several, these words shall not make the estate several, which, by the former words, was created joint. Hence the action is to be brought jointly or severally, according to the interest which it passes. 2 Binn. 138 ; 1 Bos. & P. 66.

§ 2. Joint covenants are sometimes taken distributively, for the benefit of the estate. As where two made a lease, and covenanted, "that the lessee should enjoy the land without let from them or any other person ;" and one alone disturbed

—5 Co. 19,  
case of  
Slingsby.—1  
Esp. 343.—3  
Wood's Con.  
546.—5 Com.  
D. 602.—  
Skinn. 101.—  
1 Saund. 155.  
Mod. 849.

Esp. 343,  
Meriton's  
case, Noy, 86.  
—Bul. N.P.  
158.—1Saund.  
by Wms. 153.

the lessee, it was judged to be a breach of covenant, and that the action lay against the disturber, though the words of the covenant were not several; but the covenant was construed to be joint or several. 1 Ch. on Pl. 6 to 10.

CH. 107.  
Art. 1.

§ 3. Where the covenant is a covenant in law, it shall be taken to be joint, if the interest be so; and the covenantors may be sued jointly for a breach at the time of making it. But for a subsequent breach, it may be sued severally. As where the deft. and A demised to the plt, and he entered and was ejected by the deft; the plt. alleged that neither of them ought to have demised, for one R. was seized in fee; and the court decided, that as there is no express covenant, the action is founded on the covenant in law, on the word "*demiserunt*," and as the interest granted by the word is joint, so is the covenant, and that both lessors should have been sued for that breach; but as to the eviction, the act of the deft. only, the breach is well assigned. As to this, in construction of law, each did demise, and it was a several contract, as to their subsequent acts.

1 Esp. 344.—  
Salk. 137,  
Coleman v.  
Sherwin.—6  
Com. D. 602.  
—4 Cruise,  
66, 67.—5 D.  
& E. 522.

§ 4. *Where a covenant is joint and several*, an action may be brought against *one*, and a breach may be assigned in the neglect of *both*.

1 Stra. 563,  
Lilly v.  
Hodges.—1  
Esp. 346.

§ 5. If the covenant be joint, yet if the interest be several, the covenant shall be taken to be several; and though the covenant be joint and several, yet if the interest be joint, the action must be so to; and the words "*agreed between the parties*," makes no difference,—follows the legal interest.

Bul. N. P.  
167.—Dyer,  
337.—3 Mod.  
263.

§ 6 *If a covenant be made to two, the survivor has the action.* A and B of one part in an indenture, and C of the other part, made this covenant &c., "It is agreed between the parties that C shall enter into bond to pay A £160, by such a day." A died,—the money was not paid; and the court held, that B, the survivor, must sue, and not A's executors.

Bul. N. P.  
168, Wilton's  
case.

§ 7. *Tenants in common* must join in an action of covenant for rent; as they must join in all personal actions. So of a reversion on a lease for years, they must join in covenant for not repairing; "for it is in the personalty merely."

Bul. N. P.  
168.—Esp.  
368, Kitchen  
v. Buckley.—  
1 Ch. on Pl.  
10.

§ 8. A joint lease was made to two, and they covenanted jointly and severally to pay rent; and it was held, that the executor of the lessor might have covenant against the executor of the joint lessee deceased, for the rent, though the term passed to the surviving lessee; but otherwise if the covenant had been joint.

2 Burr. 1190.  
1197, Enys,  
exr. v. Don-  
nethorne, exr.

§ 9. A covenant to and with A, his executors, administrators, and assigns, and to and with B and his assigns, to pay

1 East, 497,  
Anderson,  
adm. v. Mar-  
tindale.—5 Co. 18, 19.—Dyer, 338.—1 Ch. on  
P. 3, 4, 5, 6.

CH. 107. an annuity to A, his executors, &c. during B's life, is a joint  
*Art. 1.* covenant to A and B, in which they have a joint, legal interest, though the benefit be for A only. Hence, on A's death, the right of action survives to B, and A's administrator cannot sue on this covenant.

Dyer, 800.—  
 4 Wood's  
 Con. 546.—  
 1 Ch. on Ft.  
 6, 7.

§ 10. But "where every of the covenantees is to have a several estate or interest, then the addition of the words '*cum quolibet eorum*,' will make the covenant several in respect of their several interests. As if one by indenture convey black-acre to A, and white-acre to B, &c. and covenant with them, and each of them, that he is lawful owner of the said acres; then in respect to those several interests, the covenant by these words is made several." But if he demise to them the acres jointly, then those words are void; for a man cannot, by his covenant, unless in respect to several interests, make it first joint and then several by those or like words, "and the reason given is, that when the interest is joint, if several were to bring actions for one and the same cause, the court would be in doubt for which of them to give judgment." And a covenant to one and her assigns extends equally to executors and administrators, as if named. And if one covenantee named in a deed do not seal it, or is dead, this fact must be stated in a suit by the others.

2 D. & E.  
 476.

5 D. & E. 592,  
 596, Errington's case.

§ 11. In this case a lease was made to two, and they in the beginning of their covenants, did covenant jointly and severally, to pay, in the nature of rent, certain sums of money. And the court held, that if there be nothing in the nature of the subject to the contrary, all their following covenants will be joint and several, though not so expressed, and a covenant of the lessor's intervenes.

1 Bac. Abr.  
 533.—Comb.  
 116, Spinner  
 v. Durant.

§ 12. In this case four fidlers covenanted not to play asunder, and bound themselves in £20, each to the others, jointly and severally. If one play alone all must join in the action, "the interest being joint;" that is, if one of them forfeited his £20, all the others should recover that sum to their joint use and benefits, and not £20 each.

8 Mod. 166,  
 167, Lilly v.  
 Hodges.

§ 13. In this case "Hodges and one Griffith covenanted for themselves and each of them, and for their executors and administrators, and for each of their executors and administrators, with the said Lilly and Cardonel, to receive the rents due to the plt., Lilly, and one Cardonel in Ireland, and likewise, that they, and each of them, would pay a moiety thereof to each of them, the plt. and Cardonel; and on argument, judgment was rendered for the plt. though the action was brought by one of the two covenantees against one of the two covenantors. Lilly sued for a moiety. The breach assigned was against both, viz. that Hodges and Griffith received

£7000, and that the debt. did not pay a moiety to the plt. **CH. 107.**  
 the action was severed by the last words, by which the said **Art. 1.**  
 Hodges and Griffith covenanted each of them to pay a moiety  
 to each of the covenantees, though the covenant was joint as  
 to receiving the monies.

§ 14. *Tearing of the seal.* The rule of law is, if several persons be jointly, or jointly and severally bound, and the seal of one is torn off the covenant or instrument, it becomes void as to all; but if severally bound, then the tearing off the seal of one avoids the deed only as to him; as if three jointly and severally bind themselves, and the seal of one of them is torn off, and another of them is sued, he may crave oyer, and plead the seal of one is torn off; and in this case the plea was adjudged good on demurrer.

11 Co. 28, 29,  
 Pigot's case.—  
 3 Salk. 75.—  
 1 Esp. 172.

§ 15. So when by charter-party indented between the master and owner of a ship of one part, and Lydgate and six other merchants of the other part, by which the master and owner covenanted to transport certain goods, for which each of the merchants did covenant separately, with them, that one merchant would pay £3, and another £3, &c., and for performance of, each of the said merchants separately bound himself to said master and owner in double of the freight. Lydgate alone was sued; and he pleaded that the seal of another of the said merchants was torn off. The pls. demurred and judgment was for them; for the court held, that the six covenanted severally, and their penalties were several. Hence, breaking off one's own seal, only avoids his covenant; but if the seal of the master and owner had been broken off, their covenant being joint, the deed had been defeated; but as to the covenant of the six merchants, they are as several deeds, said the court, written on one paper; but a rasure avoids it as to all.

5 Co. 23, case  
 of Matthew-  
 son — 11 Co.  
 28.—4 Com.  
 D. 167.—3  
 Wood's Con.  
 543.—2 Lev.  
 220.

§ 16. If two men have goods in jointure, and give all their goods, these, and also their several goods pass; and so as to their rents.

Pow. on Con.  
 401.

§ 17. If the obligee of a bond covenant not to sue one of two joint and several obligors, and that if he do, the deed of covenant may be pleaded in bar; still he may sue the other obligor. But a release to such obligor discharges both; for the release supposes a satisfaction made of the debt; but the covenant does not; but the covenant operates quasi a release to the covenantee.

8 D. & E.  
 168, Dean v.  
 Newhall

§ 18. A power to four, jointly, cannot be executed by three of them. As where one declared the uses of his lands to his son, and such wife as he should marry, at the appointment of of four persons, one died before the marriage, and the court held, the power of the other three was at an end.

Dyer, 189,  
 pl. 15.

## CH. 107.

## Art. 2.

1 Bos. & P.  
66, 75, Scott  
v. Godwin.—  
1 Ch. on Pl.  
10.

§ 19. If a reversion on a lease be assigned to the plt. and another, and in the lease there is the lessee's covenant to repair, it is a covenant to the plt. and the other jointly, and they must join in covenant; or if one, as John Scott, in this case, sue alone, he must aver the other, as Robert Scott is dead; for the covenant becoming a part of the record shews a joint right and interest once existed in them, then for one to sue alone he must shew the joint interest has ceased, and the deft. need not plead this matter in abatement; and joint contractees must sue according to their interest at their peril.

1 Ch. on Pl.  
8.—1 East—  
226.—3 Bos.  
& P. 235.—6  
East, 225.—  
2 D. & E. 282.  
—5 D. & E.  
711.—2  
Saund. 116.

§ 20. It is a general principle in law as well as in equity, the courts will not sustain distinct and separate claims or liabilities of different persons, in one suit, though standing in the same relative situation. The action fails if too many plts. are joined; and whenever the legal interests of two or more are several, and no express contract with all, they must sue severally; and persons must join when the contract and consideration are joint.

ART. 2. *American rules and cases.*

§ 1. The rules of law in regard to joint and several, or joint or several covenants, are invariably the same in American as in English cases; all grounded on the principles of the common law.

1 Mass. R.  
191, Lawrence  
v. Parker & al.

§ 2. In this case three men covenanted to convey lands with warranty. And the court decided, that this covenant was not complied with by one's conveying, with warranty, and the release of the other two; for it was a material part of the contract that the grantee should have the warranty of all three covenantors.

6 Mass. R.  
460, Baker v.  
Jewell.

§ 3. According to this case, if one be bound in a covenant or contract to A and B jointly, and he settles with one of them, so that he has no longer an interest in the contract; this is a severance of it, as to any and all of the parties, and the covenantee not settled with may sue alone. But it is conceived this rule does not hold *e converso*. As if A and B jointly covenant to pay a debt to C; if C settle with A, for instance, for a moiety, C cannot afterwards sue B for the other moiety, for the covenant of A and B was joint, and it is not in the power of A and C to apportion the contract, and to subject B to an action for a moiety alone, without his consent, on a contract by which he subjected himself but to a joint action with A.

1 Johns. Ca.  
319, Ernst v.  
Bartle.

§ 4. A covenant by several persons may be construed distributively, or a several covenant, though there be no express words of severalty in it.

7 D. & E.  
350, Mansel  
v. Burridge.

§ 5. Two several tenants of a farm agreed with a succeeding one to refer certain matters in difference, as to repairs, to arbitration, and jointly and severally promised to perform the

award ; the arbitrator awarded each of the two to pay a certain sum to the third. Held, that by the terms of the agreement they were jointly responsible for the sum awarded to be paid by each. CH. 108.  
Art. 1.

§ 6. A, and B and C, trustees for said A, grant lands to D, and covenant generally to defend as to incumbrances made by them ; this may include an incumbrance made by either of them, or by two of them ; especially if some of the incumbrances contemplated by A, B, and C, be of a nature not to be jointly created. Meriton's case, Noy, 86 ; Popham, 200 ; Com. D. Condition E. In this case incumbrance made by them, A and B, was adjudged to extend to one made by either of them. 2 Wheaton's  
R. 41, 66,  
Duval v.  
Craig.

## CHAPTER CVIII.

### CONVEYANCES.

#### ART. 1. *General principles.*

§ 1. As our covenants usually make a part of our deeds of conveyance, and these deeds and covenants are generally founded on our statutes, enacted to regulate our conveyances of lands and real estates, in fee, absolutely, or in mortgage, in tail, for life, for years, &c. it becomes material, in treating of covenants, especially as they relate to land, to consider these statutes. A number of statutes to regulate the conveyances of real estates were passed by the Colony legislature ; also for making them liable for the payment of debts ; and so for conveying or passing them from debtor to creditor ; also for transferring the rights of the Indians, such as they were. These conveyances generally established by statute law to be by deeds, in which there were usually covenants of seizin and of right, also covenants of warranty, and incumbrances ; so for quiet enjoyment, for paying rent, repairs, &c. And such covenants early became the principal grounds of our actions of covenant, (as will be seen in the following chapters,) and of numerous rights.

§ 2. These Colony statutes were revised and amended by the legislature of the Province of Massachusetts Bay ; and these statutes of the Province have also been revised and

CH. 108. amended by the legislature of the Commonwealth ; how far,  
 Art. 2. in these several revisions, the same principles and spirit have  
 ~~~~~ been preserved, will best be seen and understood on examin-  
 ing the statutes themselves, as successively enacted in the Col-
 ony, the Province, and Commonwealth, and stated in this
 chapter.

§ 3. These various statutes embrace a vast body of law, out of which there will, in time, unquestionably arise a multitude of questions, and scores of volumes of comments and constructions. In general they have not been copied from any other country, but for the most part were new law in their principles and texture ; formed and suited to the circumstances of the people, for whom they were made. As yet but few comments have been written upon these statutes ; and if many judicial constructions have been made by the courts of law, they have not been preserved but in a few late cases. So far as judicial decisions on them have preserved and published, they abundantly shew that very important principles are involved in them ; especially when we consider that the general course has been to construe the deeds and conveyances, grounded upon them, in reference to the principles of the English law, on the subject of transferring real property. Hence when a deed of conveyance has been made, grounded on one of these acts, the English doctrine of seizin and disseizin, has been considered here as essential to be taken into view, in order to ascertain the legal operation of this deed, as has been stated, in part, in chapter 104. Though the statutes here to be cited have *verbatim* been enacted by Massachusetts alone, yet their principles generally, and wording in some cases, apply to several States.

ART. 2. *Colony statutes.*

Colony statutes.

§ 1. These statutes cited in this chapter, are taken from the appendix of the Massachusetts Laws, published in the year 1801. The year in which the act was passed is noted in the margin &c., and the volume and page cited thus : 2 M. L. p. 962, means 2d vol. Massachusetts Laws, published in 1801, page 962 &c. ; also to be found in Massachusetts Colony and Province Laws, re-published in the year 1814.

A D. 1641,
 2 M. L. 962,
 963, 964.—
 Deeds of
 sale.

§ 2. By the Colony statutes, no sale of houses or lands was valid, " except the same be done by deed, in writing under hand and seal, and delivered, and possession given upon part, in the name of the whole, by the seller, or his attorney authorized under hand and seal, unless the said deed be acknowledged and recorded according to law." By this act passed in 1652, it will be observed that a deed executed, and possession given, or a deed executed, acknowledged, and recorded, passed the estate and title to the grantee, whenever

A. D. 1652.

the grantor had a capacity to pass it, and seizin or possession as the law required ; either livery of seizin or recording the deed was sufficient.

CH. 108.
Art. 2.

§ 3. By another Colony act, passed in 1651, the *habendum* of the deed was ordered to be thus, "to have and to hold the said house and lands, respectively, to the said party, or the grantee, his heirs and assigns, forever." Or if in tail &c., thus, "to have and to hold, &c. to the party or grantee, and to the heirs of his body lawfully begotten, or to the heirs male of his body lawfully begotten between him and such an one, his wife, or to have and to hold to the grantee for term of his life, or for so many years." But this statute did not extend to prior deeds, or to wills, or "to any land granted, or to be granted, by the inhabitants of a town." Therefore it was that town grants continued to be informal. By a Colony law, said to have been passed A. D. 1636, towns had power to dispose of their lands, to grant lots, &c. but not said by vote. R. 416.

Forms of deeds.

§ 4. By another act, passed A. D. 1641, it was ordered, "that no conveyance, deed, or promise whatever, shall be of validity, if it be obtained by illegal violence, imprisonment, threatening, or any kind of forcible compulsion called *duress*."

C. & P. Laws,
195.—12 Mass.
R. 416.

Deeds by duress;
Act 1641.

§ 5. "And all covenous and fraudulent alienations or conveyances of land, tenements, or any hereditaments, shall be of no force or validity to defeat any man of his due debts or legacies, or from any just title, claim, or possession, of that which is so fraudulently conveyed ; and "no mortgage, bargain, sale, or grant, made of any houses, lands, rents, or other hereditaments, where the grantor remains in possession, shall be of any force against other persons, except the grantor and his heirs, unless the same be acknowledged before some magistrate, and recorded as is hereafter expressed."* This act provided that prior deeds should be recorded in a certain time ; and that parties refusing to acknowledge their deeds should be imprisoned, after being cited before the magistrate ; and that the grantee might save his title, in the mean time, by entering a caution with the recorder of the county court. If the deed was disputed, a trial was provided for in the court of assistants.

Fraudulent deeds ; Maine statute as to fraudulent conveyances &c., ch. 53.

Deeds acknowledged & recorded ;
Maine Act,
ch. 36, pp.
111, 114.

§ 6. By an act passed 1647, widows were allowed their dower, who had not been jointured in lands and houses, for term of life ; and this dower was allowed in "one third part of all such houses, lands, tenements, and hereditaments, as her husband was seized of to his own use, either in possession, re-

Dower & Jointures ;
Act 1647.

* In an action of covenant broken, held, that lands specifically devised are liable for the testator's debts, though aliened by the devisee ; also that they are liable for his debts wherever fraudulently conveyed by him to defraud his creditors. 4 Mass. R. 160, Wyman v. Brigden.

CH. 108. version or remainder, in any estate of inheritance, or of frank
 Art. 3. tenement not then determined, at any time during the marriage ;” for their natural lives, free of all debts and charges, made by the husband, otherwise than by some act or consent of such wife, signified by writing under her hand, and acknowledged before some magistrate. This act enjoined widows, so endowed, not to “commit or suffer any strip or waste ;” but to keep and have her estate in dower in good repair.

Oct. 1692 —
 2 M. L. 972,
 973.

Against
 frauds, re-
 enacted
 March 11,
 1784. See
 also Colony
 and Province
 Laws, digest-
 ed and pub-
 lished, A. D.
 1814.—New
 York Act, 10
 Johns. R. 500.

ART. 3. *Province Statutes.* § 1. By an act passed in 1692, to prevent frauds and perjuries, it was enacted, that “all leases, estates, interests of freehold, or term of years, or any uncertain interest of, in, or out of any messuages, lands, tenements, or hereditaments, made and created by livery of seizin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force, or effect any consideration for making any such parol, leases, or estates, or any former law or usage to the contrary notwithstanding.” “Except, nevertheless, all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two third parts, at the least, of the full improved value of the thing demised.” This exception is omitted in the revised law of March 10, 1784.

By the same act there were the same restrictions established in regard to assigning, granting, or surrendering any such estate or interest. And it was further enacted, that “all declarations or creations of trusts or confidences of any lands, tenements, or hereditaments shall be manifested and proved by some writing, signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void.” “Provided always, that where any conveyance shall be made of any lands or tenements, by which a trust or confidence shall or may arise or result by the implication or construction of law, or be transferred or extinguished by an act or operation of law, then and in that case such trust or confidence shall be of like force and effect as the same would have been if this act had not been passed.” And “all grants and assignments of any trust or confidence shall likewise be in writing, signed by the party granting or assigning the same, by such last will or devise, or else shall be utterly void and of none effect.” A trust resulting or by implication or construction of law will be considered in a future chapter. By a clause in the act of 1696, it was provided, if any person alienated any lands to him belonging, “with intent to defeat or defraud

his creditors of their just debts not *bonâ fide*, for good and valuable consideration, *bonâ fide* paid," such sale was void. CH. 108. Art. 3.

§ 2. In the year 1697, another act was passed for registering deeds or conveyances, which provided, "that all deeds and conveyances of any houses or lands within this province, signed and sealed by the party or parties granting the same, having good and lawful right and authority thereto, and acknowledged by such grantor or grantors before a justice of the peace, and recorded at length in the registry of the county where such houses or lands do lie, shall be valid to pass the same without any other act or ceremony in the law whatever." And "no bargain, sale, mortgage, or other conveyance of houses or lands made and executed within this province, shall be good and effectual in law, to hold such houses or lands against any other person or persons, but the grantor or grantors and their heirs only, unless the deed or deeds thereof be acknowledged and recorded in the manner as is before expressed." This act provided, that proof of deeds by two witnesses in certain cases should be equivalent to acknowledging them. When this provision as to recording deeds was reenacted, March 10, 1784, an exception was made as to leases of seven years or a less time; these by the new act need not be recorded. By these acts the common law conveyance by deed with livery of seizin was made void, except against the grantor and his heirs.

§ 3. In this it was decided, that in case of the absence or death of a grantor, without acknowledgment of the deed, its execution must have been proved by two of the subscribing witnesses previous to its registry; for "the recording the deed here has its effect from the provisions of the statute; and unless these provisions are conformed to, the conveyance is not good, but against the grantor and his heirs, except in cases of fraud or prior notice." And here the act required the proof to be in some court of record by two or more of the subscribing witnesses. "The statute introduces a new law," but if the deed be acknowledged by one of the grantors, the grantee is clearly entitled to have it recorded; "and if it be regularly recorded, the record will give equal publicity to the conveyance as to all the grantors, and so the intent of the statute will be satisfied." The court decided, this deed should have been read to the jury; but it does not appear against whom it was read, whether against the grantor, against whom it was valid, or one as to whom it was void.

Further construction of said act of 1697, as to acknowledging and proving deeds,—not necessary to acknowledge a deed made abroad &c., and one witness sufficient to prove &c. As where, June 28, 1701, Daniel Cox of London, seized in fee of

For recording deeds, 1697.—2 M. L. 983, 984.—9 W. III. c. 8; also, C. & P. Laws.—Maine Act, ch. 36.

4 Mass. R. 541, 548, Fidge v. Tyler.

Oct. Term, 1782, at Worcester, Cox v. Edwards & al.

CH. 108. the demanded premises (in Worcester county) at London, (England) made his deed to his son Daniel Cox of Trenton, (on
 Art. 3. whose seizin the demandants claimed) of said premises with other lands, in consideration of natural affection and of *ss.* It was never acknowledged, but in 1726 one subscribing witness swore before the mayor of Philadelphia to its execution in London, by the grantor, and a record of it was made at Burlington county court. And it was recorded in Worcester county 1755, and the said premises remained uncultivated till the year 1755 or 1760. Adjudged by Cushing C. J. and the court, that it was a good deed, and the demandants recovered on it. Held, on special verdict: 1. This was a deed to uses, the father's covenant to stand seized to the use of his son, and valid on 27 H. VIII. notwithstanding said act of 1697. 1 Lev. 55: 2. This deed was not within said act of 1697, which provided, "that no bargain, sale, mortgage, or other conveyance of houses or lands, made and executed within this province, shall be good and effectual in law to hold, &c. (as above) unless acknowledged and recorded," for it was executed in London: 3. It was proved by one witness in a neighbouring government in a court of record, and recorded where the land lies; hence, sufficient to pass the land; "being a deed to uses, it must be valid," unless controlled by said act of 1697. Valid by the words of the act, as it was executed out of the province. By a clause of the act proving a deed by two witnesses, if the grantor be dead, was equal to an acknowledgment, were this deed within said act; the requisites of the law (said the court) were not strictly complied with, "but they are in substance;" for the acknowledgment is but proof of the execution in order to recording the deed. "At common law," and in reason, one credible witness is sufficient to prove any fact; "and proof derived from a court of record of a sister state, is as valid as proof procured from testimony in this state." The court also held, it was as well authenticated by one witness taken before a court of record, and the recording, as deeds are required to be by the third section of said act when the grantor refuses to acknowledge his deed. But, said the court finally, if these requisites of the law must be taken in their strict and literal meaning, by the same rule the words "within the province" must be understood literally; and then the validity of the deed is not affected. This case as to one witness differs, it will be observed, materially from *Pidge v. Tyler*, above; and on the whole, this case, *Cox v. Edwards & al.* was decided only on the words "within the province," these could not be rejected as of no meaning, but had an operation as other words in the act had. As to the proof in Philadelphia the court was clearly wrong, for by the act of

1697 it was provided, if the grantor lived beyond sea or removed out of the province, or died before acknowledgment, proof of his deed was to be made by the oaths of two witnesses thereto subscribed, before any court of record "within this province." The court also seem to think this act, as it required deeds to be acknowledged and recorded, did not respect deeds to uses, but only conveyances in which the act or ceremony of livery of seizin was necessary at common law to make them valid; and in deeds to uses that ceremony is unnecessary, as by the statute of uses the possession is immediately transferred to the use. But it is observed, this act of 1697 was to prevent clandestine and uncertain sales &c. of lands and houses, and included not only conveyances by bargain and sale, and mortgage, but also by "other conveyances," certainly words comprehensive enough to include deeds to uses, and so has this act been understood. This case, also, tends to prove the said statute of uses has ever been adopted and in force in Massachusetts. The act of 1697, as above, expressly provided for proving the deed of a grantor who lived beyond sea. Did not this clause clearly contemplate a deed executed beyond sea? If so, this case was decided wrong in every respect. On the other hand it may be asked, by what process could a grantee in a deed executed in a foreign country, bring two subscribing witnesses from thence into our courts in Massachusetts to prove the execution of the deed? Some have held, that in such case the grantee should get his deed acknowledged where executed, or should have witnesses to it, whose testimony he can have in our courts; and I have known deeds executed abroad lie unrecorded several years, in order to have the witnesses to them brought into our courts to prove their execution. All things considered, the provision "executed within the province" was express, and the matter against it was but by implication, therefore the express provision prevailed.

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§ 4. This act of 1697 also saved dower to any wife, "who did not legally join with her husband in such sale or mortgage, or otherwise lawfully bar or exclude herself from such dower or right." The construction of the Province and Commonwealth laws has not been to allow widows dower in reversions and remainders, as was provided for in the Colony Laws, on one construction.

Dower; Act 1697.

§ 5. This act of 1697, also, provided for discharging mortgages, as in Ch. 112, a. 4.

Mortgages. Act 1697.

§ 6. And by a clause in the Province statute of 1712, "three years were to be reckoned," as Ch. 112, a. 4, s. 3. Within these three years all mortgaged estates were to be redeemed, and if not so redeemed, the equity of redemption was forever

Maine Act, ch. 39, pp. 122, 127.

CH. 108. foreclosed. This was not expressed to be an entry for condition broken, though perhaps so intended.
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Act 1696.
*Lands made
 liable for the
 payment of
 debts.*
 2 M. L. 982,
 983, 994,
 1012, 1013,
 1045, 1046,
 and C. & P.
 Laws.

Maine Act,
 ch. 60, pp.
 219, 233, ch.
 62.

Act 1712.
 Maine Act,
 ch. 60.

Act 1719.
 Maine Act,
 ch. 60.

Act 1759.
 Maine Act,
 ch. 60.

§ 7. In the year 1696, a statute was passed making lands and tenements liable for the payment of debts, and so for passing them in this way from the debtor to the creditor. By this act it was enacted, that "all lands or tenements belonging to any person in his own proper right, in fee, shall stand charged with the payment of all his just debts, owing by such person," and "be liable to be taken in execution," in the manner pointed out in the act, where the debtor should not "expose to view and tender to the officer personal estate sufficient to answer the sum mentioned in the execution with the charges."

The same act empowered the Superior Court to authorize executors and administrators to sell lands of the deceased to pay his just debts and legacies, so far as the personal estate was found to be insufficient for those purposes, debts due to the crown first being paid; and this act did not require them to sell at auction.

§ 8. By an act passed in 1712, one year was allowed to the debtor to redeem his lands taken on execution for debt, or to his heirs; and he might "bring his suit against the creditor or his heirs, or tenant in possession, and recover back his estate upon paying the full sum for which the same was taken, with interest from that time, and the reasonable necessary charges and disbursements laid out and expended thereon for repairing or bettering of the same, over and above what, and so much as, the rents, profits, and improvements made thereof shall fall short of re-imbursing such charges," to be accounted for by the creditor, his heirs or assigns, as in cases of mortgages.

§ 9. By an act passed in 1719, it was provided, an equity of redemption and rents might be taken in execution for debt. This act also provided, that the officer having the execution should "cause three indifferent discreet men, being freeholders in the county, one to be chosen by the creditor or creditors, one by the debtor or debtors, if he or they see cause, and the third by the officer, to be sworn," &c. "faithfully and impartially to appraise such real estate as should be shewn to them, who shall appraise the same to satisfy the execution with all fees, and set out such estate by metes and bounds; and the sheriff or other officer shall deliver possession and seizin thereof to the creditor or creditors, his or their attorney." One year was allowed to the debtor to redeem, but nothing in this act was to extend to the Indian natives of the province.

§ 10. By an act passed in 1759, it was provided, that rights to redeem mortgaged lands should be liable to be taken in execution for debts of the mortgagor; and the creditor so tak-

ing such right in execution, to have such right to redeem as the mortgagor had or ought to have ; the overplus, if any, to be paid to him. This act also provided, that "all executions that shall hereafter be levied on lands or tenements, and the proceedings thereon shall, at the charge of the creditor, within three months after such levying, be entered in the office of the registry of deeds for the county where such land lies." Debtor allowed a year to redeem, and the creditor to have a good title under the execution.

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§ 11. In this action it was decided, that when an action is levied on lands for debt, the same must be recorded within three months from the levy ; but in another case it was decided, that this need not be done as between debtor and creditor, but only as to third persons.

Mass. S. Jud.
Court, Nov.
Term, 1792,
Prince v.
Prince.

§ 12. This act of 1759 also provided, "that the real estates of any testators or intestates are, and shall be liable to be taken and levied upon by any execution issued upon judgments recovered against executors or administrators in such capacity, being the proper debts of the testators or intestates ;" and the manner of levying to be the same as in other cases. It is clear upon this clause, that the real estates of testators and intestates could be taken in execution, but for debts they themselves owed, and not for any charges or demands arising after the decease.

Act of 1759,
Maine Act,
ch. 52, pp.
187, 197.

§ 13. This act of 1759, also provided, "that whenever any testator in his last will and testament hath given, or shall give any chattels or real estate to any person or persons, and the same hath been, or shall be taken in execution in manner aforesaid, or sold by order of the Superior Court ; in such case all the other legatees, devisees, or heirs, shall refund their average or proportionable part of such loss to such person or persons from whom the bequest shall be so taken away, and he or they shall maintain a suit or action to compel such contribution."

Act 1759.

§ 14. By another act passed in 1770, the Superior Court was empowered to license executors and administrators to sell real estate in any county to pay debts, "whether the county where such application is made be the same county where such deceased person dwelt or not. And the inferior courts of Common Pleas were authorized to license sales of real estates of persons deceased in their respective counties to pay their debts.

Act of 1770,
Maine Act,
ch. 52, pp.
187, 197.

§ 15. In the year 1701, an act was passed to prevent illegal and clandestine purchases from the Indians. By this act no deeds could be taken from them of any lands or tenements for years, or otherwise, without license from the General Court ; but this act did not extend to lands east of Piscataqua river,

Act 1701.
Indian Deeds.
2 Mass.
Laws, 988,
990, 998,
1030.

CH. 108. previously granted. And all Indian leases were to be approved by the Court of Sessions of the county in which the land lay. But this act did not affect conveyances from one Indian to another.

Act 1633.

Comment.

§ 16. A law was passed in 1633, that seemed to recognize that an Indian in his native condition may be the owner of, and be seized of the lands he possesses and improves by his subduing them ; but no Colony, Province, or Commonwealth statutes have ever recognized that he can be the owner, or be seized of wild and uncultivated lands. The operation of an Indian deed as to wild lands, has ever been a subject of dispute in this State. Some have contended that the native Indians were the true proprietors of the soil of America, and hence their deeds have operated to convey the soil and seizin. Others have denied that they were owners of the soil, and have said they had nothing more than a right to hunt in wilderness lands. It is not necessary to settle this dispute in order to find the operation of an Indian deed in an American court of law, under which an American citizen claims title to wild lands ; because he claims under American law, or the law of England, as it was adopted and applied here. To form just ideas on this subject, we must resort to first principles, and apply them to some common case of an Indian deed of a tract of wild lands. The citizen who claims under an Indian deed never claims under Indian law, but under American or European law here adopted. In the laws of the English colonies in America the general principle was, that no land could pass from man to man but by livery of seizin, or by deed executed, acknowledged, and recorded ; by livery of seizin was the common law and general mode of conveyance. By such deed was the statute or substituted mode. So by the English law the general principle was, that no land could pass from man to man but by livery of seizin. By livery of seizin, the act of both parties, was the common law or general mode. But for ages, at least, there has been a substituted mode in use, as by fine levied and recorded, a recovery suffered, by lease, entry, and release, by surrender &c. of a copyhold in court &c. Those citizens who claim wild lands under Indian deeds, have had in no case any ground to pretend that any of the substituted modes in England have been in use in Indian conveyances here, and often not the statute mode in America.

§ 17. There is a material difference between an Indian deed of wild land, and a citizen's deed of such land, founded in their different rights as to property. Our statute law has ever provided, that a deed duly executed, acknowledged, and recorded, shall be sufficient to convey the lands contained in it, without any other act or ceremony in the law. This statute

law only applies to a citizen having right and power to convey ; that is, as our law has been invariably construed, having seizin of the lands ; but never to an Indian as to wild lands, for though by our law as it has stood since 1633, he may have had right to lands he has subdued, as above, and seizin of them, yet he never has been considered as having seizin of wild lands ; and there is no case to be found in which a correct lawyer has ever in a writ declared on an Indian's seizin of such lands ; as that such an Indian was seized and conveyed &c. Hence, an Indian deed never has had power to convey wild lands, for want of that kind of seizin our law views as essential to give a power to convey. A citizen by our law may have the right of soil and fee in wild lands ; an Indian in his native state cannot ; and so has the law of England, of America, and of Christendom, viewed his case from the first discovery of America ; his deed has been viewed only as extinguishing his claim, and as giving *quoad* him to the grantee, a right of peaceable entry, and not as passing the soil and fee. A universal practice in two respects evinces this. In every English patent in ancient times in America, and it is believed in every European Christian grant, there never was an exception of the Indian heathen title, though generally there was an exception of other Christian grants or settlements previously made : 2. Every Englishman who came to America viewed his English patent as giving him the legal title to the land ; and he settled with the Indians as of convenience, of equity, or humanity, and not as a matter in law essential to his title. Hence, even William Penn, as humane towards the Indians as he was, began to fix forever his settlements on his patent title before he even conferred with the Indians about their lands ; and had he never agreed with them, he had no idea of quitting Pennsylvania for want of a title to his lands.

§ 18. Exactly so was it with the eight great proprietors of Carolina, Lord Baltimore in Maryland, Roswell and others in Massachusetts ; and in all other English, if not Christian places in America. Our ancestors seemed to have made the true distinction, when, by law, they declared that Indians had property in the lands they possessed, and improved by subduing them, inferring they had no property in land not subdued by them ; this distinction was founded on the law of nature, which has ever required that labour be bestowed upon a thing common, in order to make it individual property. Europeans, in fact, have ever considered our Indians as capable of property in a *fish* or *wild beast* ; because capable of bestowing on either that labour necessary and adequate to appropriate to one's self property from the common stock ; but they have never considered them capable of property in lands generally, because

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See Ch. 178,
a. 23, s. 17.

CH. 108. generally incapable of subduing them from a wilderness to a cultivated state ; and in this respect wholly unlike Europeans.
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§ 19. On the whole, an Indian deed has never been considered, by the best lawyers, any thing more than an instrument designating a tract of land to which the Indian has relinquished his claim, the seizin of which the grantee has acquired by his actual entry on the land, claiming title, and not by reason of any seizin conveyed by the deed. And the Supreme Court of the United States has decided that the nature of an Indian title is not such as to be absolutely repugnant to seizure in fee on the part of a State, (Georgia.) 6 Cranch, 89, 148, *Fletcher v. Peck*. And in this cause it was argued, that Indian titles are merely possessory, and mere right to occupy as hunters,—a right wholly distinct from tenure,—a mere toleration within our boundaries, for the preservation of peace ; and with this view have purchases been made. This may be taking too strong ground against Indian rights.

§ 20. There always have been in this State many, and sometimes large, tracts of land, held in common and undivided, by proprietors, as tenants in common. The Kennebec Proprietors claimed, and long held, about three millions of acres ; the Pejepscott Proprietors as large a tract ; the Waldo Proprietors about one million ; the Pemaquid about 90,000 acres ; and in their respective settlements with the State, retained near half of what they thus claimed and held. Many other large tracts of land have been holden by other such proprietors ; and some tracts in almost every town, for a time, as many townships were originally granted by the legislature to a number of proprietors, who, as such proprietors, as above described, long retained, and held some parts not disposed of in common and undivided.

Proprietors' Lands ; 2 M. L. 996, 996, 1011, 1015, 1016, 1019, 1020, 1035, 1036 ; revised Mar 10, 1784 ; & additional act Mar. 9, 1791 ; & C. & P. Laws, A. D. 1814.—Maine Act, ch. 43, pp. 180, 184.

§ 21. It was early found that these proprietors, in many cases, were too numerous, and too much dispersed, to manage or dispose of such lands as individuals, or by their individual signatures ; as without being incorporated, they could never act, even by majorities ; nor could they make any lease or sale but by every one's executing the instrument. It therefore became highly necessary that they should be formed into bodies politic or corporations, both for the purposes of managing their lands, so held in common and undivided, and of disposing of them.

A. D. 1712. § 22. Accordingly, in 1712, an act was passed, enacting, that when any five or more of the proprietors of lands, lying in common, “as well those stated and divided, each one's proportion being known, as those not stated, divided, or proportioned, as aforesaid,” shall judge a proprietors' meeting necessary, they may apply to a justice of the peace, within the

county, in which such lands lie, for a warrant to call a meeting, "expressing the time, place, and occasion thereof;" and he was empowered to call a meeting accordingly, directing his warrant to one of the proprietors, asking the same, or to the proprietors' clerk, requiring him to notify the meeting, by posting notice in some public place in the town fourteen days &c. ; and the proprietors assembled, "by a major vote, to chuse a clerk, to enter and record all votes and orders," &c. and to be sworn, and to appoint a way to call future meetings, "as also to pass orders for the managing, improving, or dividing such common lands, not before stated and divided, the voices always to be collected and numbered according to the interest present, where the same is known;" "and no other affair shall be transacted at any meeting of the proprietors, than what is expressed in the warrant or notification for such meeting."

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§ 23. By an act passed in 1735, the provisions of the above act were extended to wharves, and other real estates in common. And in case of an action brought against the proprietors of any real estate besides lands, the clerk or some principal proprietor, to be served with a copy of the writ or summons thirty days before the court. A. D. 1735.

§ 24. An act passed in 1737, made provision as to several townships, granted by the General Court, and the proprietors of which voted to raise "several sums of money upon their rights or lots, to defray the necessary charges of bringing forward the settlement of the said townships;" and directed how rights should be sold to pay each proprietor's assessment. This act extended only to townships previously granted, and of course has been long obsolete. A. D. 1737.

§ 25. By an act passed in 1741, proprietors of common and undivided lands were empowered to choose a treasurer, to be sworn to the faithful discharge of his trust, and such treasurer is, by this act, "empowered to demand, sue for, recover, and receive all such sums of money, debts, and dues, as that shall at any time belong to the said proprietors, or be any ways due or coming to them, and make payment thereof again to such persons, and for such uses as he shall be lawfully ordered and directed from the proprietors," and to account on demand, and to continue in office till another be chosen. This act also empowered proprietors of common fields to raise taxes, and to choose assessors and collectors, to be under oath. A. D. 1741.

§ 26. By an act passed in 1753, respecting common and undivided lands, lying within no township, a method was prescribed for calling meetings on a justice's warrant, on petition of five or more of the proprietors, expressing the time, place, and occasion of the meeting, very nearly in the form and A. D. 1753.

CH. 106. manner expressed in the act of 1712, except the notice was
Art. 3. to be "in the several Boston weekly newspapers," forty days before the meeting; and this act empowered such proprietors, "by themselves, or their lawful attorneys at such meeting," to "appoint such method for calling their meetings, for the future, as they shall judge most convenient," which shall be under "such regulations as all other proprietary meetings are; and may choose a clerk, and such other officers as are usually chosen by other proprietors;" and transact such other matters as are transacted at other proprietors' meetings, being notified in the warrant &c.; and raise monies by assessments "on the several rights in such lands, equally and ratably, according to their respective interests and shares therein, for bringing forward and completing the settlement of such common lands, and for the prosecuting or defending any lawsuits for or against such proprietors, and for carrying on and managing any other affairs for the common good of such proprietors;" and to make sale of the lands of such delinquent proprietors, as should neglect to pay their assessments for six months, if living in the province, and if not, twelve months after public notice, the committee &c. notifying the sale forty days beforehand, in said papers; but a right to redeem was allowed for one year, by paying the sum the land sold for, and charges, and twelve per cent. interest.

*Lands sold
for taxes; 2
M. L. 1006,
1007, 1008,
1009.*

§ 27. By various statutes passed in the province, in the years 1730 and 1762, lands were made liable to be sold for the payment of taxes, in certain modes prescribed, and many tracts of lands have been conveyed for these purposes, generally in small pieces. These laws were revised, and in some respects altered, by acts passed February 16 and 20, 1786, and February 26, 1794; 1 M. L. 265 to 273, 276 to 286, 303 to 311; 2 M. L. 617, 618; acts in Maine as to taxes, ch. 106, pp. 375, 401; school taxes, ch. 67; highways, ch. 68; parish taxes, ch. 85.

*Parsonages;
revised and
re-enacted
Feb. 20, 1786,
&c.—Maine
Act, ch. 42,
85.*

§ 28. By an act passed in 1754, it was enacted, "that the deacons of all the several Protestant churches, not being Episcopal churches, and the church wardens of the several Episcopal churches, are, and shall be, deemed so far bodies corporate, as to take in succession all grants and donations, whether real or personal, made either to their several churches, the poor of their churches, or to them and their successors, and to sue and defend in all actions touching the same. And wherever the ministers, elders, or vestry, shall, in such original grants or donations, have been joined with such deacons, or church wardens, as donees or grantees, in succession, in such cases, such officers and their successors, together with the deacons or church wardens, shall be deemed the corpora-

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tion for such purposes as aforesaid ; and the minister or ministers, of the several Protestant churches, of whatever denomination, are, and shall be, deemed capable of taking in succession any parsonage land or lands, granted to the minister, or his successors, or to the use of the ministers ; and of suing and defending all actions touching the same." In this act there was a saving that it should not make void any judgment ; and that no minister alien his parsonage longer than he was minister ; and that no alienations be made of these parsonage lands without the consent of the parish or vestry ; and parishes were empowered to appoint committees to call deacons to account, to sue them if need be, also to assist them ; and no parsonage could exceed an estate of £300 a year ; but all donations afterwards made by deed, not recorded three months before the donor's death, and all bequests and devises, not made before the last sickness of the person making the same, or at least three months before the testator's death, were declared to be void.

§ 29. In the revision of this act, February 20, 1786, it was followed nearly *verbatim*, except the revised act omits these restrictions, as to deeds and wills being so recorded, or made before the donor's death.

§ 30. In the construction of this parsonage act, it has been held, that parsonage lands are held by the minister in right of his parish, and in case of his death &c., the fee is in *abeyance*, till a successor be ordained, and during the vacancy the parish is entitled to the rents and profits. If the minister alien with the parish's consent the successor is bound. If without such consent, it will be valid during his incumbency, and his successor may enter without action, or he may bring a writ of entry *sine assensu parochiæ* counting on his predecessor's seizin within fifty years ; so his writ of right on his own seizin within thirty years ; of his predecessor, sixty years. An alienation by the parish is void. 13 Mass. R. 190.

2 Mass. R.
500, 503,
Weston &
Hunt.

§ 31. Some have been of opinion, lately, that the restrictive parts of this act of 1754, above mentioned, still remain in force, and therefore that thereby large legacies given in the testator's last sickness &c. to support missionary societies &c. are void. But in the first place it is clear that this act was confined to our common parishes, in which there were deacons, settled ministers, and church vestries ; hence the annual amount of estate to any one was not to exceed £300 ; and the second, the restrictive section, spoke of all the donations and bequests the act contemplated, and spoke of all of them, as being to corporations and bodies politic ; and at the time this act was passed, there were, in the province, no religious

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Second. All the matter of this second restrictive section, or clause, was clearly matter of proviso or limitation to the first section, which contained all the body and substance of the act; and all this matter might well have been brought into the latter part of the first section, by way of proviso or limitation. It seems to be agreed that the first section was repealed by being revised *verbatim* in 1786; and matter of proviso as naturally falls when that is taken away whereto it is a proviso, as the shadow fails when the substance is removed that occasioned it. And so the committee who revised the act of 1754 probably viewed the case, for how could they intend to leave in force mere matter of proviso, or of limitation, after that was repealed to which this matter appertained? Repeal the body and substance of an act, and all provisoes and limitations thereto fall of course, as a proviso cannot exist after the thing or matter, whereto a proviso or limitation, is done away, as the body and substance of an act must be when revised and re-enacted *verbatim*; for if not repealed, there would be this strange thing in legislation, two acts in force on the subject, *verbatim* alike, but passed at different periods.

10 Mass. R.
 93, Brown v.
 Porter.

§ 32. Entry *sur disseizin*, by the minister of the first parish in North Yarmouth, demanding 100 acres of land in Freeport, lot No. 33, range B, on his own seizin, in fee, in right of said parish, within thirty years, and on the tenant's disseizin: issue, *non disseizivit*. North Yarmouth formerly included Freeport, and the town paid ministerial charges; before North Yarmouth was incorporated, the original proprietors of the township appropriated one right to the use of the ministry. In 1730, Mr. Cutter, the first minister settled in the town, took possession of the home lot, drawn or appropriated by a vote of the town to the right of the ministry. And in 1733, when the lot in question was drawn to the same right, the town voted to have it cleared for Mr. Cutter. Other lots were afterwards drawn to the same right, some in the part now Freeport, and some in the part now North Yarmouth. As to marsh lot, the town in settling Mr. Loring, in 1736, voted to have the hay cut by a Mr. Sweetser to the halves, and Mr. Loring to have half. In 1763, Mr. Brooks was settled, and the town stipulated with him to relinquish his right in the ministerial lands. In 1769, Mr. Gilman was settled, and the town voted he should have certain lots of them. The other lots included this sued for, were reserved in the use and occupation of the town. He continued minister till 1807, and had the use of the lots so voted him, but no use of the others. In 1810, the demandant was settled in this first par-

ish, salary \$750 a year ; and the parish stipulated with him that when the ministerial lands should be sold, the income of the fund produced by the sale should be a part of his salary. April 1810, he entered on the lot demanded, claiming it as minister in right of his parish. In 1770, Freeport became a district, and North Yarmouth, in voting its assent to the separation, reserved the ministerial lands. In 1774, by a vote and grant of North Yarmouth, the inhabitants of Freeport took one ministerial lot there situated, but not the one demanded, on which they built their meeting house. In 1775, by another vote of the town, the inhabitants of this Freeport district, on their petition, had leave to take "the lumber cut or to be cut on the ministerial lot, within the district, to build a meeting house with." In September 1789, appointed an agent to take care of the ministerial land in that town, and voted to clear a part of it that year, then in a state of nature. In the same season Mr. Johnson was settled in Freeport, and immediately took possession of the ministerial lands, including this lot now sued for. In 1791, he began to fence it, inclosed a part of it, and remained in possession till dismissed in 1806 ; after which the tenant occupied by order of a committee of Freeport, appointed to lease it &c. In 1794, "the North-west Congregational Society in North Yarmouth" was incorporated. In consequence of this and for other reasons, the inhabitants constituting Mr. Gilman's parish, convened as a parish, and assumed the name and title of the First Parish in North Yarmouth ; this was the remaining part of the old town. Several very material points were settled in this action :

First. That lands, which before the year 1754, had been, by the *original proprietors* of a township, appropriated to the use of the ministry in the town, were, by the provincial act of 1754, concerning grants and donations to pious and charitable uses, vested in the minister of the town for the time being.

Second. A donation of lands to the use of the ministry, has the same import as a donation of parsonage lands to the use of the minister or ministers ; "both intend the ministers in their official capacity."

Third. It is an estate in fee simple in the minister of the parish, and his successors, as a sole corporation ; in *abeyance* during the vacancies in the ministry, but in the possession and under the care of the parish, or aggregate corporation.

Fourth. Lands so appropriated, on even common law principles, remain with the residue of the original parish or society, and in no manner distributed by a separation, nor among the new created parishes, within the limits of the corporation. Brunswick v. Dunning, Ch. 48.

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Art. 3.

Fifth. The statute of 1754 vested this lot in question in Mr. Loring, the then settled minister, as an estate in him and his successors; and all the consequences of this statute then, if not before, took effect upon these lots, drawn or appropriated to the use of the ministry, including the one in question; then in 1754, this lot became unalienable by the town, and the estate of their ministers to be holden by them in succession. And this succession is with the ministers of the first parish, to this purpose the religious corporation, to whose use the appropriation was made, "being what remains of that aggregate corporation, after the separation and changes of limits, which have taken place under the sanction of the legislature."

Sixth. The proprietors of North Yarmouth, who made these appropriations, and the inhabitants there, afterwards incorporated as a town, must be viewed as different bodies of men, even if at any time constituted by the same individuals; "because proceeding and acting to different purposes, and in different capacities;" hence the town has no power to control or dispose of what the proprietors appropriated to its use, and the statute has established a title in the minister.

Seventh. Any temporary arrangement may be made by the minister and parish, or he alone may alienate during his ministry. Hence if the ministerial lands be continued in the occupation of the parish, by his consent, the minister's title is not thereby affected, nor by any vote the parish has no power to pass.

Eighth. As the demandant declared on his own seizin, and proved none but under his entry in April 1810, it was essential he should prove his right of entry at that time, and the court held he had a right of entry then, as no actual adverse possession appeared till Johnson inclosed a part of this lot, in question, in 1791, about nineteen years before April 1810, of course the possession accompanied the title till Johnson entered adversely. What seizin of a predecessor is necessary to enable a minister to maintain a writ of entry for ministerial lands.

12 Mass. R.
285.

10 Mass.
R. 450,
Brigden v.
Cheever.

§ 33. *Assumpsit* on Massachusetts statute for contribution, of February 6, 1784, s. 18, stating a devise of lands in Charlestown to the plt., and another devise to the deft. of lands in Princeton, by the will of Moses Gill, Esq.; and that the plt's. lands were taken to satisfy a judgment recovered by Ward Nicholas Boylston against the executor of said will, claiming contribution according to said statute, and alleging a promise &c. Held, that the devisee, whose land is so taken, has his several action against each of the other devisees and legatees liable to contribute, without first obtaining a probate decree for apportionment; and though the executor gave bond to pay

debts and legacies, and has been guilty of waste in suffering such land to be so taken : and in such action, the plt. recovers only the proportion of the value of the debt's. devise or legacy to the testator's whole estate, without any addition on account of the death or insolvency of any other of the devisees or legatees ; by the act, " all the other legatees &c., shall refund their average or proportionable parts," &c. ; now if all could be sued jointly, the whole execution might be levied on one alone, this is not according to the act.

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Art. 4.

§ 34. Towns and proprietors of common lands anciently passed their title to such lands by vote without deed. This was a decision on a grant the town of Springfield made, by vote only, February 3, 1684, and no deed, of a tract of land four miles wide across the eastern side of the town, surveyed into three divisions, June 4, 1729, and soon " laid into lots." Held, the title passed by the vote of 1684 ; objected, corporations can only grant by deed, and nothing passed by the vote ; not decided what the effect of such a modern vote might be, but the court viewed the point settled as to ancient votes, and cited the said Colony law of 1636, empowering towns to dispose of their lands, to grant lots, &c. ; also observed, by another law of the Colony, proprietors of lands in common had power to manage, improve, dispose of, and divide their lands, by a major vote. Held, by an early construction, they could grant their lands by vote, without deed ; cited 10 Mass. R. 146 ; 3 Mass. R. 352.

12 Mass. R.
416, Springfield v. Miller.

ART. 4. *Statutes in the American revolution.* § 1. In this revolution several statutes were passed for confiscating the estates of certain conspirators and absentees who adhered to the king in this revolution. The estates of twenty-eight persons, king's officers when the revolution commenced, were confiscated by the statute itself and without process. The confiscation extended to all their estates, real and personal, rights and credits, of which they were seized or possessed, or were entitled to in their own right, or which any other person stood seized or possessed of, or entitled to for their use. This confiscation extended to no estates but those they had or continued to have after the 19th of April 1775. The personal estates of the absentees were confiscated by the legislature in fact, but their real estates were not confiscated, but on judicial process carried on in a certain form prescribed. Many lands in this State were passed and conveyed under these acts. The wives or widows of these persons had the improvement of a third of their personal estates for life, where such wives or widows remained under the American government, and also, of one third of their real estates. Several decisions have been made on these acts not very important, as they in their nature were limited as to time and property.

Confiscated estates.
2 M. L. 1053,
1073. A. D.
1778 to 1783.

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Art. 5.

15 Mass. R.
44.

4 Dallas, 14,
Cooper v.
Telfair.

4 Cranch,
415, Higgin-
son v. Mein,
and 420.

6 Cranch,
226, Smith v.
Maryland.

1 & 2 M.
Laws. See
Ch. 11, a. 6.

1 M. L. 118
to 124, Feb.
21, 1818.
How execu-
tors &c. out
of the State
sell. Mass.
Act, Feb. 19,
1819.—See
Ch 115, a.
10, s. 11, 12,
13, 14.—
Maine Act,
ch. 51, s. 68,
&c., ch. 52.

*Executors &c.
empowered to
convey.*
Maine Act,
chs. 51, 52.

On a writ of right, held, that a judgment of confiscation of an absentee's estate vested it absolutely in the State, and binds him and his heirs, though no execution issued, and the State's sale of it is valid, though after the peace of 1783, and after he returned to the United States &c.

§ 2. *Confiscations in other States*—acts of, in Georgia, held not repugnant to the constitution.

§ 3. Confiscation of the estate of the mortgager, there was no confiscation of the estate of the mortgagee, a British merchant, whose debt was only sequestered during the war, and independent of the treaty of peace. If a confiscation act would be construed to destroy such mortgagee's claim, this treaty restored his lien on the land in its full force. Twenty years presumption.

§ 4. The question was, if a confiscation on a State law was complete before the treaty of peace; and held, a writ of error lay to the highest State court in the case. But by the confiscation acts of Maryland the equitable interests of British subjects were confiscated without office found or entry or other act done, though such interests were not discovered till after the peace.

ART. 5. *Commonwealth statutes.* § 1. Since Jan. 1784, the province laws or statutes on this subject have generally been revised and mostly re-enacted, but with the following additions and alterations by no means considerable.

§ 2. In an act passed March 4, 1784, the Supreme Judicial Court and Court of Common Pleas were authorized to empower executors, administrators, and guardians, to sell and convey the lands and tenements of deceased persons, and of wards for the payment of debts owed more than their personal estate would pay; also in certain cases to sell and convey the whole real estates in order to put the proceeds at interest.

§ 3. And in this act there was introduced a new provision as follows, to wit: "that whenever it shall be represented and made to appear to the justices of either of the aforesaid courts in form aforesaid, (by petition) by any person or persons contracted with by bond, covenant, or other contract under seal, that a deceased testator or intestate in his or her lifetime entered into such bond, covenant, or contract to convey some real estate to him or her, but was prevented by death; and that such person or persons contracted with, as aforesaid, have on his, her, or their part performed, or stand ready to perform, the conditions of such bond, covenant, or contract made with the deceased, the said justices" may, after due notice and hearing, empower the executors or administrators of such deceased obligor &c. to convey to the persons contracted with, as the obligor &c. was bound to do, if living

at the time of the performance ; “ the contractees on their part making reasonable allowances for any alterations, improvements, or injuries, that may be made or done in the same estate since such contract was made, as the said justices may award ;” and the consideration money in these cases is made assets in the hands of the executors or administrators when paid to them, and distributed as personal estate.

§ 4 By an act passed Feb. 28, 1807, power was given to the courts of law aforesaid, to authorize the guardians of persons wasting &c. their estates by excessive drinking &c. to sell and convey them, with the approbation of the overseers of the poor of the town, to pay debts.

§ 5. In the act of March 10, 1784, as to frauds in conveying lands, there is added a new clause providing, “ that no action hereafter shall be maintained upon any contract or sale of land, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement upon which such action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized.” In this same act also, justices of the peace or magistrates in the other States, and in other countries where the grantor may be, have power to take acknowledgments of deeds. In this act also, instead of the words *houses* and *lands* used in the act of 1697, are used the words *lands*, *tenements*, and *hereditaments*, probably without meaning to alter the law in this respect. Also it is provided, “ that when any grantor or lessor as aforesaid, shall go beyond sea, or be removed out of this government, or be dead, before the deed or conveyance by him executed shall be acknowledged as aforesaid ; in every such case the proof of such deed or conveyance made by the oath of one or more of the witnesses whose names may be thereto subscribed, before any court of record within this Commonwealth, shall be equivalent to the party’s own acknowledgment thereof, before a justice of the peace as aforesaid.” And by this act also a lease for not more than seven years need not be recorded.

§ 6. And by an act passed June 28, 1787, provision is made that where the grantor is deceased before the deed is acknowledged, and also the subscribing witnesses are dead, then “ the proof of the handwriting of the grantor or grantors, and of the subscribing witnesses thereto, made by the oath of two witnesses before any court of record within this Commonwealth, shall be equivalent to the party’s own acknowledgment before a justice ;” provided the grantee took actual possession in the lifetime of the grantor, and continued that possession

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A late act of Feb. 10, 1818, has extended this power to a writing not under seal. *Guardians of spendthrifts.* Maine Act, ch. 62.

Frauds, writings as to lands. 1 M. L. 131 to 134. *Alterations.* Maine Act, ch. 63.

Proof of Deeds ; also Maine Act, ch. 36.

1 M. L. 396, 396. Further proof of deeds. Maine Act, ch. 36.

CH. 108. quietly by himself or tenant to the time of the application to
 Art. 5. the court.

*Refusing to
 acknowledge
 deeds. Maine
 Act. ch. 36.*

§ 7. Also in the act of March 10, 1784, it was provided, that if any grantor &c. should "refuse to acknowledge" any bargain, sale, &c. it should "be lawful for the grantee or lessee to leave a copy of the deed, or lease compared with the original by the register" in his office. And this copy is made sufficient caution to all purchasers and creditors for forty days from leaving the copy; and any justice of the peace in the county after such refusal, "at the request of the grantee or lessee, his heirs, executors, administrators, or assigns," may issue a summons to the grantor or lessor to appear at time and place "to hear the testimony of the subscribing witnesses thereunto." This summons must be served seven days previously. "And at such time and place, whether the grantor or lessor be present or not, it being made to appear by the oath of one or more witnesses thereunto subscribed, that they saw the grantor or lessor voluntarily sign and seal the deed, and that they subscribed their names as witnesses thereunto at the same time; such proceedings and a certificate thereof, under the hand of the justice annexed to the deed (whether in the presence or absence of the adverse party is to be noted,) shall be equivalent to the acknowledgment of the grantor before a justice of the peace." The witnesses do not by these provisions swear to the delivery of the deed, but only supply the place of an acknowledgment, which is no proof a delivery.

*Conveyances
 by married
 women. 1 M.
 L. 404, 405.
 New law,
 Maine Act,
 ch. 67.*

§ 8. By an act passed Nov. 21, 1787, the Supreme Judicial Court is authorized to empower a married woman, whose husband is absent, "not making sufficient provision for her support," on petition in his absence from this Commonwealth, in such wife's own name, to sell and "convey any estate, real or personal, of which she is seized and possessed in her own right, and to sue alone" &c., as fully as if sole. If she make a contract in his absence, it has the force of one made by her before marriage. Notice on such petition is as in cases of a petition or libel for a divorce.

*Where adms.
 &c. may con-
 vey lands;
 1 M. L. 446,
 448, mortgag-
 ed or taken in
 execution.
 New law,
 Maine Act,
 ch. 39.*

§ 9. By an act passed February 11, 1789, as to mortgages, executors and administrators are authorized to recover estates mortgaged to their testators and intestates, (they dying before recovery of possession,) and declare on their seizin and possession; and such estates, when so recovered, "shall be assets in the hands of executors and administrators, as personal estate; and the executors and administrators shall have the same control and power of disposal, of all the estate which the said deceased had in the lands, tenements, and hereditaments, mortgaged, as if they had been a pledge of personal estate;" and if not necessary for the payment of debts, the

same to be distributed, after so recovered, and the executors or administrators becoming seized and possessed thereof, "to the sole use and behoof of the widow and heirs of the intestate, or such devisees of the testator, to whom said estate may be decreed," by the judge, "as of personal estate accordingly;" but if wanted for the payment of debts, legacies, annuities, or charges of administration, then to be sold by order of court, as other real estate of the deceased is; subject to the right of redemption, if sold before that be gone.

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§ 10. By the same act, (as to estates taken in execution,) if executors or administrators take real estate in execution, for debts due to testators or intestates, they "shall be seized and possessed of the whole estate in the lands, tenements, or hereditaments, so set off, to the sole use and behoof of the widow and heirs of the deceased intestate, or to the residuary legatee or legatees of the testator, as the case may be; and the court of probate may make distribution of the same, as of personal estate, accordingly;" unless wanted as above, then to be sold by order of court as above, subject to be redeemed as the law provides; and if redeemed, the executors or administrators may receive the redemption-money, and "discharge the said mortgaged premises, or other estate levied upon, by release, quitclaim, or other legal conveyance." But nothing in this act is to affect any last will or testament.

For construction of this act, as to the seizin &c. of the executor or administrator in possession, see *Boylston v. Carver*, Ch. 112, a. 5, and Ch. 82.

§ 11. By an act passed February 23, 1796, "pews and rights in houses of public worship," are declared to be real estate, but not retrospectively; and deeds of them, and executions extended on them, must be recorded by the town clerk, or clerk of the district or plantation, and, in that case, to be as good and valid as if recorded in the registry of deeds for the county. And generally held to be real estate before this act.

Pews; 2 M. L. 714.—10 Mass. R. 323, Bates jun. v. Sparrell.—Maine Act, ch. 36.

§ 12. By the act passed March 10, 1784, sect. 6, any mortgagee of any lands &c., his "heirs, executors, or administrators," having received satisfaction &c., shall, at the request of the "mortgager, his heirs, executors, or administrators," acknowledge payment in the margin of the record of the mortgage, in the register's office, and sign the same, and this shall forever discharge the mortgage; and if the mortgagee &c. neglect ten days to do this after request, and "tender of reasonable charges," or sign and seal a discharge and acknowledge it, shall be liable to make good all damages for want thereof, "to be recovered by special action of the case."

Mortgaged estates; 2 M. L. 853, 854.—Maine Act, ch. 39.

CH. 108. § 13. By an act passed November 4, 1785, whenever an action is brought to recover, for the breach of condition, &c.

Art. 5. judgment must be for the plt. "to recover so much as is due according to equity and good conscience;" and if the debt be not paid in two months the plt. to have his writ of possession; and mortgaged estates are redeemable by the mortgager, "his heirs, executors, administrators, or assigns," on paying the debt and interest, deducting rents and profits the mortgagee &c. "may have received, over and above the repairs and improvements made by him;" "unless the mortgagee, or person claiming under him, hath by process of law, or by open and peaceable entry, made in the presence of two witnesses, taken actual possession thereof, and continued that possession peaceably three years."

Remedies in equity; Ch. 112, a. 4.—Maine Act, ch. 39.

Mar. 1, 1799, § 14. By an act passed March 1, 1799, it is provided, that where any mortgagee &c. "have lawfully entered and obtained, or shall lawfully enter and obtain the actual possession of such lands" &c., for the condition broken, the mortgager &c., vendor, or other persons lawfully claiming under them, shall have a right to redeem "within three years next after such possession obtained, and not afterwards." This act then provides the mode of redeeming, and mode of process by bill in equity in the Supreme Judicial Court, or Court of Common Pleas in the county, if the mortgagee refuse to surrender up the estate.

Mar. 1, 1799, Maine Act, ch. 39.

By this act also rights to redeem mortgaged estates may be attached and sold on execution at vendue, three years being allowed to redeem this equity of redemption, so sold. One year, by an act of February 1816. As to defeasances, see act 1802, post.

Estates tail; § 15. Previous to March 8, 1792, our only way to convey an estate tail was by common recovery, according to the English practice. But this act, passed 1792, providing an easier and more simple method for conveying estates tail in fee simple, enacts, that any person, "seized and possessed of any lands," &c. in fee tail, of full age, may, "by deed, duly executed before two credible subscribing witnesses, acknowledged before the Supreme Judicial Court in any county, or the Court of Common Pleas in the county where such lands lie, or before any justice of the peace," &c. and recorded in the record of deeds in such county, for a good or valuable consideration, *bonâ fide*, to give, grant, sell, and convey such lands, &c. "in fee simple to any person," &c. capable of holding estates &c., and this deed so executed &c., is sufficient to bar all estates tail, and all reversions and remainders thereon.

Mass. Act, Mar. 8, 1792.—Maine Act, ch. 86.

2d sect. of the same act makes all estates tail liable for the debts of the tenant in tail, "in the same way and manner as

other estates are liable," as well after the death of the tenant in tail as before. CH. 108.
Art. 5.

The 3d sect. of the same act enacts, that when any person shall devise any lands &c., to one for life, "and after his death to his children, or heirs, or right heirs, in fee, such devise shall be taken to vest only an estate for life in such devisee," "and a remainder in fee simple in such children, heirs, or right heirs."

§ 16. On this act it has been decided, that a conveyance of an estate tail may be for a *good* as well as a *valuable* consideration; and so are the words of the act. 2 Mass. R. 467, Wheelwright v. Wheelwright.

§ 17. Also under this act it has been held, that the guardian of a person *non compos mentis* may, if duly licensed by a proper court, sell and convey, in fee simple, the estate tail of his ward, during his life, for the payment of his debts, and that by such sale the estate tail is extinguished, and the remainders thereon effectually barred. In this case it was said by the court, that by the first section of this act of 1792, the "tenant in tail may by deed, for a good and valuable consideration, sell his estate tail to be holden by the purchaser in fee simple;" and by the second section his estate may be sold for the payment of debts, as is above stated; and as estates in fee simple may be sold &c., so clearly may estates tail: that the words in the first section of this act, which speak of the tenant in tail being "seized and possessed," mean no more than the common law implies, that is, that any one must be seized and possessed to convey to a stranger; for if dis-seized and dispossessed, he cannot convey to a stranger, but can only release his right or estate to one in the estate, or seized or possessed of it,—and so this act has been understood.

§ 18. And in this case of *Soule v. Soule*, it was resolved, that a deed of tenant in tail must be made for good or valuable consideration, *in fact*; and that it is not sufficient that it merely purports to be so made. It may be observed, this was an estate tail to the third generation, created in 1764, and sold in 1804, by the tenant in tail, "by a deed *purporting* to be for good and valuable consideration, to A, and he to B, and by B to the tenant in tail, Nathaniel Soule, father of the plt., in fee simple; but it appears in the case, that there was, in fact, no consideration in any of the deeds, but the intention of all the parties was, to bar the estate tail of Nathaniel Soule, and to vest in him a fee simple estate; but had it not been agreed by the parties that there was no consideration; and had it not been agreed that such was the intention, the deed of the tenant in tail must have estopped the parties to say it was not for good and valuable consideration; because, but for such agreement, no averment lay against the express

5 Mass. R. 61, *Soule v. Soule*.

CH. 108. words of the deed by any party to the transaction ; however,
 Art. 5. one " not a party to the transaction, was not precluded from
 shewing its true nature." By this act the tenant in tail can only convey in fee simple, whereas by *common recovery* every kind of estate might be created, as an estate in tail, for life, &c. The succeeding heir in tail, claiming *per formam doni*, is not a party to or under the deed of the prior tenant in tail. Parker J. in this case said, that if the parties had not expressly agreed that no valuable consideration had been paid, it had been difficult to have gotten over the express averment in the deed. But how does this agree with Judge Sedgwick's idea, above, " one not a party to the transaction is not precluded," &c.?

Sedgwick
Justice.

Mass. add.
Act, Feb. 18,
1806.

§ 19. By this act it is enacted, that in all cases " where an estate tail in remainder in lands," &c. with all the remainders and reversions thereon, might be barred by common recovery, duly suffered, " by the tenant of the freehold, and remainder-man joining therein," such estates tail, and remainders and reversions, may be as effectually barred " by the deed or deeds of the tenant of the freehold, and of the remainder-man," as by common recovery, provided such deeds be executed, acknowledged, and recorded, as is above provided. This act only respects estates tail in remainder, on estates of freehold, and the conveyances of both ; and the second section of the act of March 8, 1792, making estates tail liable for the payment of debts, makes no mention of the tenant in tail being " seized and possessed." 6 Mass. R. 328, Dow jr. v. Warren. When the act of limitations once begins to run against an heir in tail, no subsequent event can interrupt its progress ; and no *formedon* after twenty years.

Defeasances.
3 M. L. 92,
Maine Act,
Ch. 36.

§ 20. By an act passed June 23, 1802, it was provided, " that no title or estate, in fee simple, fee tail, or for term of life, or any lease for more than seven years from the making thereof, of any lands, tenements, or hereditaments, within this Commonwealth, shall be defeated or incumbered by any bond, or other deed or instrument of defeasance, hereafter to be made, in the hands or possession of any person but the original party to such bond, deed, or other instrument, or his heirs, unless such bond, deed, or other instrument of defeasance be recorded at large in the registry of deeds, in which the original deed, referred to in the said bond, deed, or other instrument of defeasance, shall have been recorded."

§ 21. These, with the act, s. 23, are all the statute modes of conveyance of any importance in Massachusetts, in regard to land or real estate. Many of them are unknown to the English law ; and several of them, as conveyances of estates tail by deeds, of pews, estates taken in execution by execu-

tots and administrators, and mortgaged estates recovered by them, as also the sale at vendue, of the mortgagor's equity of redemption have been introduced within a few years. It has been deemed best to insert here the substance of the whole that the system so valuable may be seen and used complete.

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§ 22. Thus our statutes, few in number, simple and plain, have, from the first settlement of the country, established a valuable system of conveyance of real estate in the various modes in which real estates are conveyed in fee, in tail, for life, or years; absolutely, or in mortgage to pay debts &c. This whole system of conveyance by deed recorded, that so well enables every man usually to know every man's title, has grown out of a few statutes, predicated on a few sound and plain principles, and passed by the legislature of the colony in its early settlement. In this system, a deed duly signed, sealed, delivered, and acknowledged, is made the ground work in every conveyance of any importance; and in the first settlement of the country this deed, accompanied either by livery and seizin on the land conveyed, or by a public record of the deed in the county in which the land conveyed is situated. But after the use of such deed recorded, was well ascertained and understood, this livery of seizin was discontinued, and this deed recorded, properly viewed as the best evidence of conveyance and the best sort of notoriety. This public record of deeds naturally led to other records equally useful, as the records of devises and of executions levied on lands. Very early there was adopted a liberal construction of these statutes; a construction well calculated to prevent frauds and overreaching, by holding the record of the deed essential, not as to him who knew of it, but only as to the after *bonâ fide* purchaser, for a valuable consideration, and without notice of the existence of this unregistered deed, and without notice of the title acquired under it.

Notes.

§ 23. *More general powers in equity given to Massachusetts Supreme Judicial Court.* By this statute this court has power "to hear and determine in equity all cases of trust arising under deeds, wills, or in the settlement of estates, and all cases of contract in writing, where a party claims the specific performance of the same, and in which there may not be a plain, adequate, and complete remedy at law;" and the bill or complaint may be inserted in a writ of attachment, or original summons, returnable to the same court, and such writ may be served as in other cases; "or the same may be otherwise brought, according to the course of proceedings in courts of chancery. Said court, by this act, has power "to issue all such writs and processes as may be necessary or proper to carry into effect the powers hereby granted;" and

Mass. Act,
Feb. 10, 1818.
—Maine
Act, Ch. 50.

CH. 109. to make all necessary rules and orders for the convenient and orderly conducting of the said business. This act is, however, confined to cases of contracts made in writing, after it was enacted. March Term, 1818, this court made sundry rules accordingly, as in 14 Mass. R. 466.

It is impossible to foresee the many important cases which will in time grow out of this short act in the settlements and conveyances of estates, or how far it will extend chancery proceedings.

CHAPTER CIX.

MODES OF CONVEYING LANDS. DEEDS &c.

ART. 1. *General principles.* There have long been many ways or modes of conveying lands and estates in Massachusetts. These have been derived: 1. From the laws of England, adopted here: 2. From our own statutes, some attention to which is necessary, especially as it is often a practice to covenant or agree to convey lands generally, without specifying any particular kind of conveyance, in which case the covenantor performs his contract, by making a legal conveyance in any legal form; and no action lies against him for the breach of it, though the covenantee may not be satisfied with the particular form or kind of conveyance, the party covenanting adopts. Also, as already observed, it has been a very general practice here to insert covenants in our deeds and instruments of conveyance of almost every sort. But to save the covenantor's covenant to convey, he must make a legal conveyance; and the question may often arise, what is a legal conveyance of lands or estates in this Commonwealth, as to its nature or kind, as well as to its particular forms of words.

As our statutes on this subject, at least our practice upon them, have been engrafted on the English conveyances adopted here, it is proper to examine these conveyances.—How two deeds constitute one contract; as where A conveyed land to B, made a mortgage by his bond to reconvey, and B agreed to sell it to C, and conveyed it to A, and he at the same time conveyed it to C, and both deeds were immediately registered; held, both were parts of one contract. 13 Mass. R. 51.

ART. 2. *English conveyances adopted here.* § 1. In Eng- CH. 109.
land there are four kinds of conveyances or common assuranc- Art. 2.
es of real property : 1. By deed in *pais* between the parties ; this “by the old common law used to be done on the very 2 Bl. Com. 294.
spot to be transferred :” 2. By matter of record, or an as-
surance transacted only in the public courts of record : 3. By
special custom : and 4. By devise or a man’s last will. The
last will be included in another chapter. Devises contain no
covenants, and if a man covenant to convey, it is not within his
contract to devise the lands, unless a devise be particularly
named, and then it is but a contract to make such a will.

§ 2. None of the forms of conveyance by special custom
in England have been adopted here ; hence they may be
laid out of the case ; nor have we any conveyances by special
custom or general usage, unless by our towns and parishes ;
and in regard to married women ;—these will be further con-
sidered hereafter.

§ 3. As to matters of record we have adopted only the
English mode or manner of passing lands by suit and judg-
ment of court, and grants by the State legislature of lands
owned by the State ; but never the English practice of sel-
ling private estates by legislative acts, or of confirming pri-
vate deeds by such acts. Though we have the practice of
enabling executors, administrators, and guardians to sell the
estates of minors and others for special purposes in special
cases, in which the courts of law cannot afford a remedy.
These also will be considered hereafter. Many of these pri-
vate acts of parliament are to be seen in the first volume of
Wood’s Conveyancing, pages 1 to 186.

In Pennsylvania the wife conveys as in England, so far as 1 Dallas, 11,
14, Davey &
ux. v. Turner.
the magistrate examines her separate from her husband. This
mode of conveyance is said to be founded on usage. See
chapter 223.

ART. 3. *As to deeds.* Sixteen sorts of deeds are named
in England : 1. Feoffment : 2. Gift : 3. Grant : 4. Lease :
5. Exchange : 6 Partition : 7. Release : 8. Confirmation : 9.
Surrender : 10. Assignment : 11. Defeasance : 12. Cov-
enant to stand seized to uses : 13. Bargain and sale : 14.
Lease and release : 15. Deeds to lead uses : 16. Deeds to
revoke uses All of these forms we have adopted, except the
feoffment and the bargain and sale, in the particular English
form ; and there have been cases in which our deed deliver-
ed on the land has been construed a feoffment. Perhaps
some of these forms of conveyance have been unnecessarily
adopted, and merely from the circumstance that our ances-
tors, who came to this country, found them in use in the old
country which they left, and being there used to them, appli-

CH. 109. ed them here without attending to the very different conditions of that *old* and this *new* country. Probably when our ancestors first arrived, and their legislature established a short and simple form of a deed of conveyance, as appears by their statutes, before cited, they generally had no idea of using so many of the English forms of conveyance, which had really arisen in that old country, in the course of many centuries, and from the dangers and fears of confiscations in civil wars, the encroachment of the clergy, the numerous estates tail, and many other circumstances peculiar to those times, and to that country. There the ancient mode of livery of seizin, almost exclusively in use in very ancient times, and when but few could write, was found to be defective in practice; bounds and mere delivery of possession might easily be forgotten, misunderstood, or become incapable of proof. No simple, plain, valid, and intelligible form of conveyance by deed, was there introduced by the legislature, as it was here. Hence, there was a necessity of new forms, and these being left to any body, and every body to devise, necessarily became numerous, and of late have so entangled estates in that country, that acts of parliament to disentangle them have become extremely numerous. There, too, the abolition of the feudal system, and the introduction of an immense commercial one; and the consequent necessity of raising monies by incumbering estates, without absolutely selling them, produced further changes in conveyances.

4 Cruise, 10,
11, 12,

4 Wood's
Con. 429.—
8 Salk. 119.—
Co Lit. 229.
—2 Bl. Com.
297.—
4 Cruise, 125,
127, 128.—
Co. Lit. 174.
—2 Bl. Com.
295, 297.—
4 Com. D.
166.—Co.
Lit. 35.—
3 Salk. 120.

§ 2. We have adopted the English deed substantially in the English form. It must be written or printed on parchment or paper. The Saxons conveyed lands by delivery of turf and twig. The first deeds were by Withredus, king of Kent, A. D. 694, and first called by them *chirographa*, and then *charters* by the Normans, and after some time, *deeds*. For several centuries the English and our deed has been an instrument uniform and well understood, "a writing sealed and delivered by the party." Its assential parts ten: as 1. Writing: 2. On paper or parchment: 3. A person able to contract: 4. By a sufficient name: 5. A person able to be contracted with: 6. By a sufficient name: 7. A thing to be contracted for: 8. Apt words: 9. Sealing: and 10. Delivery; signing also, by our statutes, is essential.

1 Bl. Com.
68.—4 Com.
D. 158.—Co.
Lit. 7.—2 Bl.
Com. 304.—
4 Cruise, 28,
29, 33, 48.—
2 Bl. Com.
294, 304.—1

§ 3. It is a principle of common law, that no deed is valid without delivery, but though in a deed of grant, premises, *habendum*, warranty, in testimony, date, witnesses, &c. are usual and proper, yet not essential, as the deed is good without them; and it is a maxim, "that no deed shall be void, which by any construction can be made good." "The deed

Wood's Con. 373.—6 Com. D. 165.—Hob. 120.

must be founded on good and sufficient consideration, not a usurious contract, nor on fraud or collusion, either to deceive purchasers *bonâ fide*, or just and lawful creditors, any of which bad considerations will vacate the deed." And if a deed be not read when requested by the party, or read falsely, it is void, especially to one who cannot read.

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§ 4. *Sealing*. If A execute a deed for himself and his partner, in his presence, and by his authority, it is good, though only once sealed and but one seal. Adjudged on a plea of *non est factum*. All may use one seal making several impressions. 1 Bos. & P. 360.

4 D. & E. 311,
313, Ball's
case, 5 D. &
E. 366.—
Perkins, s.
134.—3 Com.
D. 166.
1 Cranch,
178.—2 Ld.
Raym. 700.—
1 Johns. Cas.
114, 250.

§ 5. *Delivery*. And in the same case the court said, there was no particular mode of delivering a deed, that it was sufficient that the party executing it treated it as his deed. Held, on *non est factum* pleaded. And no instrument which is not delivered can be a deed; this only need be pleaded with a *profert*. Feltham v. Cudworth.

§ 6. In this case it was decided, that when a deed signed, sealed, delivered, and acknowledged, is committed to a third person as the deed of the grantor, to be delivered over to the grantee on a future event, it is presently the deed of the grantor, and the third person is trustee of it for the grantee. But if delivered to the third person as the writing or *escrow* of the grantor to be delivered on some future event, it is not the grantor's deed till the second delivery, and if the grantee get possession of it before the event happens, the grantor may plead *non est factum*. It cannot be delivered as an *escrow* to the grantee or obligee. Where an *escrow* becomes a deed absolute &c., as where A and B referred their disputed title to lands, and each made his quitclaim deed and acknowledged it to the other, and both put their deeds into the hands of the referees to be delivered as they might award the title; held, that publishing the award was the condition of the delivery, and that being performed, the deed to the prevailing party became absolute, though after such publication the other party forbade the delivery. In fact the deed was put into a situation to become absolute in favour of the party found by the referees to have the title. Sheriff may deliver a deed of land sold on *fieri facias* as an *escrow*, but it is void if the money be not paid in a reasonable time after the day of payment.

4 Cruise, 29.
—2 Mass. R.
447, Wheel-
wright's case.
—9 Co. 136.
Kirby's R. 64,
and 2 Johns.
R. 248.—1
Root's R. 87.
—4 Cranch,
219.—9 Co.
136.

Kirby, 64,
Peck v.
Goodwin.

8 Johns. R.
520, 557.

§ 7. *Consideration*. Strictly none is necessary in a deed, as was stated in a former chapter. And if £28 be expressed, £30 may be proved the real consideration; and it is clear the party may prove other considerations than those expressed in the deed. A valuable consideration is money or marriage &c.;

3 D. & E. 474,
The King v.
Inhabitants of
Scammon-
den.—2 Bl.
Com. 297.—
Willes, 677.—
1 Johns. R.
139.—4 Johns. R. 161.—3 Johns. R. 506.

CH. 109. a good consideration is blood, love, and affection. Acknowledging a deed does not conclude. 4 Cruise, 24, 27, 37.

Art. 3. § 8. *When void.* A deed is void *ab initio*, when it wants any of the essential parts before mentioned, or it becomes so by rasure, interlineation, or other alteration in a material part, as breaking or defacing the seal, by giving it up to be cancelled, by the disagreement of such whose concurrence is necessary to make the deed stand, or by judgment of court. In either of these cases it may be void in whole or in part, as formerly stated.

1 Co. 1, 2, 60.
Lit. 6.—6 D.
& E. 710,
Worsely v.
Wood.—
1 Ch. on Pl.
312.—5 D. &
E. 695, Tarleton v. Stainford.
2 Day's Cas.
280, Mallory v. Aspinwall.
—1 Phil. Ev.
419
6 D. & E. 710,
Worseley v.
Wood.

§ 9. *Possession of title-deeds.* The grantor shall have them when he is bound to defend the title, and if not, then the grantee shall have them; for they go with the land, unless the grantor is bound to warrant and defend, and liable to be vouched to defend, then he is entitled to the deeds as the means of his defence of the title to the lands. 2 H. Bl. 574. If the heirs of the mortgagee merely possess an ancient deed, releasing the equity of redemption, it is sufficient evidence the deed was delivered. Covenant lies on a policy. 6 D. & E. 710.

§ 10. *Reference in a deed.* If a policy of insurance refer to printed proposals, they are to be viewed as a part of it. So a plan referred to in a deed has often been held to be a part of it.

§ 11. *Delivery of a deed.* It has been decided, that if one seal and put his deed on the table, with an intent the other party take it, and he takes it, this is a good deed. So, if he deliver it as his deed to a stranger. And s. 5 before. 1 Phil. Evid. 418 to 421, cases. A executed his deed conveying lands to B, and acknowledged it, but without B's knowledge, then took up the deed in his absence, and said to C, "Take this deed and keep it; if I never call for it, deliver it to B after my death; if I call for it, deliver it up to me." C took the deed; A died soon afterwards, never having called for the deed, then C delivered it over to B. Held, this was the deed of A presently: 2. That C held it in trust for B: 3. That the title on A's death became consummate in B: 4. That by relation the deed took effect from the time of the first delivery. That last position must clearly have its exceptions, especially as to the possession and *mesne* profits &c. between the first delivery and A's death. So as to the second, for C did not hold it in trust for B alone. How a delivery may lose its effect: as where a deed is made to several persons, not designating their proportions, they take equally &c., not regarding how the consideration was paid; nor can it as paid by each be inquired into by parol; and if one grantee dissent, his share remains

Owen, 98.—
2 Roll. 24.—
4 Com. D.
156.—Palmer, 109,
112.

4 Day's Ca.
66, Belden
& al. v. Carter, cited 1
Phil. Evid.
419.

4 Day's Cas.
395, Treadwell & al. v. Bulkeley & al.—1 Johns. Ch. R. 240.

in the grantor ; as to this grantee the deed has no effect. Where a deed is executed without the grantee's knowledge, though the law presumes his assent, yet this presumption may be rebutted by proof of dissent. Ck. 109.
Art. 3.

Three acknowledge a deed, and one of them in the presence of the others, holds it up and says, " we acknowledge it, but others are to sign it," a jury may infer a delivery as an *escrow*. 4 Cranch,
219, &c.,
Pawling v. U.
States.

A patent conveyance of land in one State, is one of those public acts to which every State is bound to give full faith and credit, under the constitution of the United States ; therefore, its validity cannot be called in question collaterally in the courts of any other State, on a suggestion that the survey on which it was founded was a forgery. Lassly v.
Fontaine, 4
Hen. & M.
146.

§ 12. If my deed be on the table and I tell the other party to take it, this is a delivery, and I am bound by the deed. Co. Lit. 36,
&c.—4 Com.
D. 166.

§ 13. So if I once deliver my deed I am bound by it, though I afterwards use words expressing my intent to be otherwise. Some add a *quære*—but this must depend on all my acts in the case making one transaction or not. 4 Com. D.
156.—12
Johns. R. 631.

§ 14. So the common seal of a corporation fixed to a deed is equal to delivery, and binding. See *Ridden v. Shute*. 2 Roll. 23.

§ 15. But if I deliver a deed to a stranger as an *escrow* to be my deed on a condition performed, it is not my deed till that condition is performed, though the party happen to have it before. 2 Roll. 25 —
Co. Lit. 36.

§ 16. So a lease from a corporation, not in possession, with a letter of attorney, the lease is not binding or good if the attorney do not deliver it on the land. 2 Roll. 24.—
4 Com. D.
157.

§ 17. *Who is party to, or bound by a deed.* If one execute a deed without reading or hearing it read, he is bound by it, and it is his deed. If one be very ignorant and cannot read, his deed is not void if he do not request it to be read. 4 Com. D.
157.
2 Johns.
R. 404.

§ 18. So if one party to an indenture execute his part, it is his deed, though the other do not execute his part ; but not in all cases. Cro. El. 212.
—Co. Lit.
229.

§ 19. An indenture is made between A on one part, and B and C on the other ; and A leases to them, who covenant with A, B seals, C agrees to the lease but does not seal ; it is his deed and he is bound by it. But *quære* in our practice. Co. Lit. 231.
—4 Com. D.
156, 159.

§ 20. So if A and B covenant on one part, and C and D on the other, and B do not seal, yet he may have covenant against C and D ; for he is named as a party, and they covenanted with him. 2 Roll. 22.—
4 Com. D.
153.

§ 21. If by deed between A and B, A leases to B, and afterwards C adds, that he covenants B shall pay the rent, and Carth. 76.—
4 Com. D.
160.

CH. 109. signs the deed, C is bound and covenant lies against him, though not a party to the original deed.

Art. 4.

44 E. III. 23.

—2 Rol. 28.

Co. L. 231.—

Ray. 142.—

4 Com. D.

160, 161.

§ 22. So if I agree to execute a release of a trespass, and instead of this I execute a release of the land, it is not binding, for it is executed by mistake.

§ 23. None can take a present interest by a deed who is not a party to it; but may take in remainder, though not a party to the deed. As a deed between A and B only, and A conveys to B for life &c., remainder to D for life, D shall take the remainder, though he be no party to the deed, but a stranger to it. Mistake in the date of a deed does not vitiate it; and where the consideration in it is stated to be a certain sum of money, not mentioning any particular sum, it is sufficient.

2 Johns. R. 230.

§ 24. On this point it is a general principle, that to bind one by deed he must assent to it when he signs or seals, but he may take advantage of a deed, and sue upon it in many cases, by afterwards assenting to it; as is the case of him in reversion or remainder; or, as where one makes a deed to the benefit or advantage of another, if he shall see fit to assent to it when he shall have knowledge of it, and when notified of it he does assent to it.

1 Dallas, 60.
—6 Mod. 44.

§ 25. The court must admit a deed under seal to be read, but what use will be made of it is another thing.

ART. 4. *Exceptions &c. in deeds.*

Co. Lit. 47.—

1 Wood's

Con. 329.—

Dyer, 57.—

4 Cruise, 46.

—Shep.

Touch. 77.

§ 1. There is a material difference between an exception and a reservation. An exception is when a part of the thing mentioned is saved to the grantor or lessor: in fact, the part or thing excepted by him is not granted or leased. Out of a general a part may be excepted, as one acre out of a manor, this acre is not granted or leased. But a part cannot be excepted out of a certainty; as where twenty acres are demised, excepting one acre, for such an exception is repugnant; so if white-acre and black-acre except white-acre. A reservation is proper where some new thing not before in *esse*, is to be rendered to the lessor or grantor, and the proper words of a reservation are *reserving*, *rendering*, *paying*, *finding*, &c. The proper words of an exception are, *excepting*, *saving*, &c. One having no interest cannot except or reserve. 4 East, 469.

Co. Lit. 47,
143.

Cro. Car. 437.

—Jones, 396.

—1 Wood's

Con. 328.—

4 Mod. 9, 12,

Cudlip v.

Randall, cit-

ed 1 Cruise,

270.

§ 2. The effect of an exception is to retain in the grantor or lessor the thing excepted. As if one lease a tenement, excepting a house for his own use and occupation; here the house is wholly in the lessor and is not demised, and so is the case whether the lessor use the word *excepting* or the word *reserving*. So the plt. by indenture leased a tenement to the deft. for seven years, except and always reserved out of the lease aforesaid, to the plt., his executors, and administrators, the *new house*, for the use of the plt. and his family, if he or

they dwell in it, but not to be let to any other person, and at all other times when they do not live there, then to the use of the deft. and his assigns. The court held, that the deft. was tenant at will, and the new house absolutely excepted out of the demise. CH. 109.
Art. 4.

§ 3. *Exception when void.* An exception must always be of a part of the thing, and not of part of the estate; and a man cannot except that which he cannot take or have. As if one assign his term, and except the timber-trees on the land, or the gravel or clay in it, this exception is void; for he cannot except to himself a thing which by law does not belong to him, but to the inheritance.

§ 4. So where A leased all his lands in E, except black-acre, and had only that acre; the court held, the exception was void, and that black-acre was leased; for the exception went to the whole thing demised, which was repugnant.

§ 5. So where A leased a house and shop, excepting the shop; the court decided, that this exception was repugnant and void. It was of all the shops; also the husband leased his wife's estate generally, including the shops, and his exception of them was special and temporary, to wit, during the occupation and use of the lessor himself, and in the shops themselves, he reserved or excepted less than he leased.

§ 6. In this case A let a rectory for years, excepting the mansion house of the rectory, saving to the lessee the chamber in question. Held, here is an *exception out of an exception*, which is good, and the chamber is leased; "for this exception or saving makes the thing excepted as if it never had been let. So a saving out of a saving makes it as if it never had been excepted, and then it passed by the force of the lease at first."

§ 7. A thing *dehors* excepted. As in an action of covenant it appeared that the plt. leased a house to A for years, excepting two rooms, with a passage way through the hall, and other parts leased. A assigned to the deft., and he stopped this passage way. Held, covenant did not lay for the lessor for disturbing him in the two rooms excepted; for he had never leased them, and the lessee's covenant, expressed or implied extended not to them; but that an action of covenant did lie when "the exception is of a thing *dehors* to the lessor, as a way, common, estovers," &c.; for when the way is over land leased, it is a reservation, and there is an implied covenant on the part of the lessee that the lessor shall enjoy it.

§ 8. It is another rule, that a man cannot reserve to himself a less estate than he has already, unless he parts with the whole, and takes back the less estate by way of use.

1 Wood's
Con. 329.—
5 Co. 13, in
Saunders'
case.—Shep.
Touch. 75,
77.—

4 Cruise, 46.

1 Cro. 6,
Dorrell v.
Collins.—
Shep. Touch.
75.—

4 Cruise, 46.

1 Wood's
Con. 329.—
Hob. 170.—
Dyer, 264,
Horaby v.
Clifton.

Cro. El. 372,
Leigh v.
Shaw.

12 Mod. 24,
25, Bush v.
Cole.—3 Cro.
667.—11 Co.
50.

Dyer, 309,
Cranmer's
case.

CH. 109. § 9. So any profit *apprendre* may be excepted, that is, by the agreement of the lessee the lessor shall have the same ;

Art. 4. hence covenant lies. And it is a rule of law that an exception must be of such a thing *as may be severed* from the thing granted or leased, and not of inseparable incidents ; and if of the last kind, the exception is void ; but several incidents may be excepted.

Pow. on Con.
240, 241.
Dyer, 69. —
Shep. Touch.
75.

Shep. Touch.
77.—4Wood's
Con. 330. § 10. "An exception is good only for a part of the thing passed by general words in the premises." Hence an exception of a thing granted by a special name in the premises is void, and if *all* granted in the premises by general words, be by special names excepted, the exception is repugnant and void.

Shep. Touch.
76, 77.—Hob.
170.—1
Wood's Con.
330, 331. § 11. So the exception must be conformable to the grant. As if one grant lands to another, *except the profits*, or a close, *excepting the grass*, the exception is void. And the things excepted must be described with certainty. In fact there is the same certainty required in the description of the thing excepted, as in the conveyance of it. And the exception in a deed must be taken favourably to the grantee.

3 Johns. R.
375.

Shep. Touch.
7.—1 Wood's
Con. 331. § 12. If a man grant land, excepting the trees thereon, or sells wood, and except twenty of the best oaks, and shews which in certain, these are good exceptions ; for the trees are a part of the thing granted, yet may be severed and known. So one may grant a reversion, and except the rent, and so keep the rent from passing to the grantee by the grant. The rent, in its nature, may be well severed from the reversion.

§ 13. See some of the material principles of exceptions as to trees, in *Liffords' case*, cited somewhat at large, Ch. 76, a. 8.

1 Wood's
Con. 333.

§ 14. If a lessee, for life or years, may underlease, he may except the trees ; for he remains tenant and liable for waste ; but otherwise if he assigns, then such exception is void.

Co. Lit. 143.
—1 Wood's
Con. 334.

§ 15. The exception out of the thing granted may be in any part of the deed ; and the exception may be by the words before mentioned, or by other words that carry the same sense, the words *other than*, will make an exception.

§ 16. For many other exceptions, see 1 Wood's Con. 327 to 234 ; and 4 Com. D. *title, Fait*, E 5, 6, 7.

§ 17. Though not all the principles of exceptions or reservations, are material to be considered here, yet many of them clearly are necessary to be understood ; for as to deeds and leases, it is frequently important to understand these principles, in order to know what is legally excepted by the grantor or lessor, and what is not excepted but is granted or leased, or is only reserved. Covenants and deeds respect what is granted, leased, or reserved, and generally only these things.

For instance, A leases his farm to B for years, but excepts his parlour, and way to it, and B covenants to keep the leased premises in repair, and a question arises to what things or parts his said covenants extend. It is necessary to understand the principles of exceptions to see they do not extend to the parlour, because it is excepted, and so no part of the demised premises; and also to see they do not extend to the way, being the usual way to the house, because the way is not excepted, but only reserved, and is a part of the leased premises, and must be kept in repair among other parts. So if an exception of a part be void, then it is not in fact excepted, but is a part of the leased premises, and then is affected by the covenants expressed or implied touching them; and to understand if void or not the principles of exceptions must be understood; and upon the true construction of the words of exception depends the question, has this or that part of the interest named been conveyed or passed to the grantee or lessee, or not?

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§ 18. *Reservation &c.* A husband conveyed lands in fee to his three daughters, reserving the use of it to his wife for her life, on condition she maintained two of the daughters. Held, that this reservation did not enure to the husband's use; hence his subsequent conveyance of the land to A in fee did not defeat the reservation, or rather grant to the wife for life, as far as he could grant to her. But was not this a grant *in futuro* to her?

1 Day's Ca.
271, Humphrey v. Humphrey.

Several matters as to deeds follow.

§ 19. *Lodging a deed in the registry &c., the effect.* One so lodged, and the register's entry on it, is, in law, a recording so as to secure the title to the grantee in it, and when the record is completed, the title is good from the execution, by relation, even against an after *bonâ fide* purchaser, purchasing without notice of such prior deed, the deed not being actually recorded at the time of the second purchase.

Kirby, 72,
M'Donald v. Leach.

§ 20. *A mere trustee may convey though disseized.* As where A conveyed lands to B by an absolute deed, and B covenanted at the same time to re-convey, on being indemnified as to a note he had endorsed for A's accommodation; afterwards B was disseized by C. A performed his condition, and saved B harmless; and B, while out of possession, re-conveyed to A. Held good, and not within the statute against selling pretended titles; for the re-conveyance was in pursuance of a lawful agreement made before the disseizin; and after the condition was performed by A the mortgagor, B the mortgagee was a mere trustee; also the estate of B was not real property, within the meaning of the statute. *Quære* if this re-conveyance was good, on the principles of the common

4 Day's Ca.
234, Gunn v. Scovil.

CH. 109. law, (and see Seizin and Disseizin, also Mortgages;) for by A's deed to B he conveyed the seizin to B, and it appears he took possession, and this seizin and possession C took from B; how then, while C had them, could B convey seizin to A? Art. 4.

3 Johns. Ca. 101.—4 Day's Ca. 244, Sherwood v. Burr & al.

Perhaps under all the circumstances of the case A had a right of entry, after he performed the condition. Nor is an incorporeal hereditament issuing out of real estate, within said statute; it applies only to property of which one may be ousted or disseized, and of which there may be livery of seizin.

9 Johns. R. 55, Jackson v. Demont—And 10 Johns. R. 164, 166.

§ 21. *Difference between disseizin and the act against buying pretended titles in New York, &c.* As if A, out of possession, conveys to B lands held adversely by C; this conveyance is, of course, void, so that B cannot have an action &c., and not material as to the operation of the deed, that the parties know or not of the adverse possession; but second, it may be material if either of them were sued for the penalty given by the said statute. A deed given pending a suit, how far valid to bar the action. A tenant in possession, claiming to hold adversely after issue joined in ejectment against him, received a release of the premises from one of the lessors. Held, (though perhaps maintenance,) the release was valid between the parties, and barred the lessor, though admitted by consent, where it should have been pleaded, since the last continuance.

9 Johns. R. 163, 169, Jackson v. Sharp.

§ 22. *The doctrine of disseizin is to be taken strictly.* A took possession of land without title, then contracted with B for a deed of it. A assigned B's covenant to C, who received a deed from B, November 1807, and September 1808, a deed from D, the patentee and true owner, duly recorded in October 1808. In September 1807, the patentee had given a deed to G, not recorded till April 1811. Held, the original possession of A being without claim or title, was to be deemed the possession of the patentee, the true owner; and the possession of C, assignee of A, was not adverse. Every presumption is in favour of a possession in subordination to the true owner. And if A or his agent purchase, having notice of a prior deed not recorded, it is as to him as if recorded; but 10 Johns. R. 164.

8 Johns. R. 489, Williams v. Tibbets.

§ 23. If one out of possession convey lands, possessed by another adversely, the conveyance is void, and the title remains in the grantor so as to enable him to maintain ejectment.

9 Johns. R. 73, Hornbeck v. Westbrook.—Carth. 76.

§ 24. Reservation to the inhabitants of a town, not incorporated, to cut wood on land sold, and not in fence, how void. The trustees of the town of Rochester, not incorporated, in 1728, gave a deed of land to A, with a *proviso* reserving to the inhabitants a right to cut wood on the lands conveyed, when not within fence. The proviso was adjudged void. If

9 Co. 69.—Co. L. 3.—8 Johns. R. 385.

operative it only gave a right to the inhabitants then living at the time of the grant, as the proviso contained no words of perpetuity and the inhabitants were not a corporation. CH. 109.
Art. 5.

§ 25. If a deed be not acknowledged before it can be entered with the town clerk to the effectual purpose of caution, the grantor must be required to acknowledge it, and if he refuse, caution having been entered after such demand and refusal, the deed, though not acknowledged, may be given in evidence in an action of ejectment. 3 Day's. Ca.
600, Bond v.
Kibbe.

ART. 5. *Habendum*. § 1. Much depends on the true construction of the *habendum* in a deed or lease; for on a true construction of the *habendum* often depends the question, what is the estate that is granted or leased by the deed, or leased or not. And usually the covenants in either only extend to the estate, property, or premises granted, or leased, or conveyed. If no one be
named as
grantee in
the premises,
one may take
named in the
habendum.
4 Cruise, 431,
432.

§ 2. Sometimes the terms or estates expressed in the premises are explained away or varied by words in the *habendum*, as well as in some other parts of the instrument. Ch. 8, a. 1,
s. 2.—4
Cruise, 47.

§ 3. The general principle seems to be, that "the *habendum* may lessen, enlarge, or explain, or qualify; but not totally contradict or be repugnant to the estate granted in the premises." As if in them the grant be to A and his heirs, *habendum* to him for life, the *habendum* is void, as being repugnant to the premises. But if one give land to A and his heirs, *habendum* to him and the heirs of his body, this *habendum* is good, and he has only an estate tail; for the *habendum* explains what is meant by heirs in the premises, and this explanation is consistent. 2 Bl. Com.
298.—2 Co.
23, 24.—8 Co.
154.—Lofft,
191, 398.—
8 Co. 307,
Altham's
case.—
4 Cruise, 431,
438.

§ 4. A gift to A and his heirs without any *habendum*, or to hold to A and his heirs, naming him only in the *habendum*, is good. So a deed is good and valid, though the grantee be named only in the *habendum*, if none in the premises be named. Co. Lit. 7.—
3 East, 115,
Spyve v. Top-
ham.

§ 5. One Sturton leased lands to J. S. for life, *habendum* to him and A, B, and C, his three sons successively. And the court held clearly, the sons shall not take in possession, not being named in the premises, nor shall they take in remainder; for the intent was to give them the lands in possession, and there is no remainder; and another lessee than the sons was named in the premises. Cro. E. 51,
58.—Winds-
more v. Ho-
bart, Hob.
313, cited 4
Cruise, 431.—
Co. Lit. 299.

§ 6. A grant for life, to have the land to him and his heirs, is a fee; for "the *habendum* may enlarge, though it cannot abridge the premises." But it is a part of Blackstone's rule, above stated, that the *habendum* may lessen the estate in the premises; and so is Altham's case by explanation. Habendum
may qualify.
1 Co. 154.
As an estate
in fee to one
in tail. Co.
Lit. 163.

CH. 109. § 7. So the *habendum* may sever the premises ; as where
Art. 5. lands are given or let to two, *habendum* to one for life, remainder to the other for life or in fee. So a grant to A and B, *habendum* one moiety to A and the other moiety to B, they are tenants in common. But a grant to A and B, and *habendum* one acre to A and the other to B, is a joint-tenancy, and the *habendum* is repugnant and void ; for the grant is joint, and the *habendum* is in severalty, and so of an estate totally different ; but a joint estate in the premises and one in common in the *habendum* are not so.

8 Ed. III. 59.
 —2 Co. 55.—
 4 Com. D.
 165.—Salk.
 391.—Co.
 Lit. 183.
 Fisher v.
 Wigg.

§ 8. A grant of a thing in the premises, *habendum* together with another thing which is not part of it or appendant to it, that mentioned only in the *habendum* will not pass. If the *habendum* limit an estate to one not party to the deed, it is void as a present estate, but may be good by way of remainder ; but a grant to A in the premises, *habendum* to the use of A and B, B takes by way of use, and A may be seized to his use.

Hob. 161,
 313, 314.—
 4 Cruise, 432.
 —13 Co. 55,
 Sammes'
 case.

§ 9. A lease is made to A, B, and C, by indenture, to have and to hold to them for their lives, provided, and it is agreed and covenanted, and granted between them, that the second shall not occupy the land during the life of the first, and the third shall not occupy during the life of the second ; held, this is a joint estate, and the proviso is void. The grant was joint, and the proviso several successive estates.

Cro. El. 89,
 107, Savile v.
 Cabit.

§ 10. "If land be granted to A, *habendum* to A and B and their heirs, to the use of them and their heirs, though B can take no estate, because named only in the *habendum*, yet the limitation of the use is good, and by that they shall be joint-tenants." A grant to A, B, and C, *habendum* to A for life, remainder to B for life, remainder to C for life, they take in succession. One may take in remainder, though named only in the *habendum*.

GRB. Cases,
 274, cites 13
 Co. 55.—
 Dyer, 160.—
 12 Mod. 11.—
 4 Cruise, 433.
 —4 Cruise,
 431.

§ 11. A grants a term for years to B, *habendum* after A's death, the *habendum* is void, and the term passes presently ; for by the assignment of his term the whole passed in the premises, then to commence after the assignor's death, is repugnant. The lower court held the assignment not good. But this judgment was reversed in the Exchequer Chamber, and that reversal affirmed in the House of Lords.

12 Mod. 11 to
 13, Germin
 & ux. v. Or-
 chard—Salk.
 346, same
 case.—Hob.
 171.

§ 12. It is said in several books, that if lands be given to A and the heirs of his body, *habendum* to him and his heirs, he has an estate in tail with a fee expectant, for otherwise the *habendum* would be void. And some say it is the same if land be given to him and his heirs, *habendum* to him and the heirs of his body ; and the reason given is, that the fee simple given in the premises shall not be taken away by the *haben-*

Co. Lit. 20,
 21.—4 Com.
 D. 165.—
 8 Co. 164,
 cited 4
 Cruise, 496,
 437.—Cro. J.
 476, Turn-
 man v. Co-
 oper.

dum, unless the express purport of the words enforces such a construction ; as where land is given to A and his heirs, *habendum* to him and his heirs, if he have heirs of his body, and if he die without heirs of his body it shall revert &c. But does not the above *habendum* to him and the heirs of his body clearly enforce the construction mentioned of an estate tail ? And as the words, *special heirs*, mentioned in the *habendum*, may well explain the word *heirs* in the premises used generally, the idea of an estate tail only is the most correct, as first above in Altham's case ; and on the general principle also, that when a deed contains a general clause, and afterwards descends to special words, which may stand with the general clause, then the deed shall be interpreted according to the special words ; but not when the first words are special and the last general, as heirs of the body in the premises, and heirs generally in the *habendum* ; for then another rule applies, viz : "*Generalis clausula non porrigitur ad ea quæ antea specialiter sunt comprehensa.*"

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Art. 5.

§ 13. A lease to B for years, *habendum* to B and C for life, nothing passes to C, and B has only an estate for his own life ; for the *habendum* which is only to hold passes nothing. So that one cannot take any estate in the *habendum*, but by way of use, he can take or have conveyed to him by the premises only. This rule is laid down too generally ; B in this case may well have his estate enlarged by the *habendum*. But C can take nothing by it, because not named in the premises, and another is, and according to all the cases where an estate vests in one in the premises, another cannot take by the *habendum* alone, but by way of use, as Gilb. Cases, 274. But it is not true, "that one cannot take any estate in the *habendum* but by way of use ;" for he may take by the *habendum* only, when no grantee is named in the premises ; for then the premises merely describe the thing and make a general grant, and the name of the grantee usually first inserted in them is only postponed to the *habendum*. And when no estate vests in any grantee by force of the words of the premises, it may well vest in one first named in the *habendum*, and so is *Spyve v. Topham*, 3 East. And the same rule holds, if a grantee's name be inserted in the premises by mistake, or may be rejected as surplusage there, for then it operates as no name at all in the premises.

Jones, 310.—
4 Com. D.
166.

Co. Lit. 7.—
Shep. Touch.
75, Buller v.
Ellen.—Atk.
41, Erles v.
Lambert, but
Cro. El. 908,
Bustard v.
Coulter, contra.

§ 14. If I bargain and sell land for a valuable consideration to A, *habendum* to the use of myself for life, remainder to the use of A in tail, remainder to my right heirs, the *habendum* is void, and A has the land in fee, for this *habendum* is inconsistent with the premises and consideration.

2 Dyer, 156,
Tyrril's case.
—3 Dyer,
272.

CH. 109. § 15. I sell land to A, *habendum* to him in trust for B and
 Art. 6. C and their respective heirs and assigns forever, in fee simple :

3 Johns. R. 388, Jackson v. Meyers. this creates only a life estate in A, and at his death the legal estate reverts to me, and B and C have no remedy but in equity to enforce the trust, and where it appears the parties mean a contract to convey, and words of absolute conveyance will have no effect.

ART. 6. *Principles of conveyances on Massachusetts statutes.*

§ 1. The essential parts of these statutes have been cited or stated in chapter 108, with some explanations applicable to particular parts of them. As our conveyances of lands are grounded wholly, or in part on these statutes, it is material to understand the principles of a deed made, executed, acknowledged, and recorded according to the requirements of them ; these have not varied the ten parts of the English deed before stated, but have made signing an eleventh requisite, nor have these statutes varied the usual parts of that deed.

§ 2. In considering our statute deed the material question is, when does the land or estate described in it pass from the grantor to the grantee, does it pass when the deed is executed, or when the grantee enters, or when the deed is recorded ? There are seven material points of view in which this deed is to be considered to this purpose of passing the estate.

§ 3. 1st. It is clear, that the land or estate does not pass at all by force of the deed, unless the grantor when he executes it has good right and legal power to convey it ; because by the very words and intent of the Colony, Province, and Commonwealth's statutes, (as in Ch. 108) the deed is not made effectual to pass or convey it, but when the grantor has " good and lawful right and authority thereto." And that right and authority was, as we have seen in Ch. 104, seizin of the estate or possession claiming title to it. This right and power then by all the said statutes themselves, is the very foundation on which the deed has any force or effect to pass the estate, and these statutes are founded in good sense and the sound principles of law ; they proceed on the ground, that the grantor must have in himself and in his seizin, the very land or estate he undertakes to convey to another ; and when he has thus had the estate, and then only, have the statutes made his deed effectual to pass and convey it without any other act or ceremony in the law.

§ 4. 2d. It is also clear, that when the grantor has this right and authority to convey when he executes his deed, and the grantee actually enters under it and records it, the estate passes to and vests in him fully, both as to the property and possession, and *quoad* every body ; but though the grantor have this right to convey lands, and though the deed be ack-

nowledged and recorded, yet if obtained by *duress*, he or his heirs may avoid it by an entry on the land within twenty years : 2. Lands may be conveyed to the inhabitants of a town in their corporate capacity by deed or devise ; 13 Mass. R. 371, *Inhabitants of Worcester v. Eaton* ; same case Ch. 90, a. 10, s. 27, in substance : 3. And where the grantor's prior deed to A is so avoided, the grantor's second *bonâ fide* grantee may recover the land from A.

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§ 5. 3d. It is also clear, that if the grantor thus have this right and power at the time he executes his deed, and the grantee actually enters under it, the estate is vested in him, and he has the seizin, and the land and estate is passed and conveyed to him to all intents, so far as respects the grantor and his heirs, though the deed be not recorded ; for the statutes expressly declare the deed good as to him and them, though not recorded. And it is also valid against him and them by *estoppel*, though the grantee has not actually entered. And also the estate passes by the deed so executed by the grantor, having such right and power, when the grantee actually enters, though the deed be not recorded, as to creditors of the grantor who attach the estate or levy executions on it as his, and as to purchasers who purchase it after they have notice of such deed, as notice in fact ought to be as good as notice by recording the deed ; and after they know the grantee has made a fair purchase, it is a fraud in law to attempt to deprive him of the estate ; and his open and visible possession is sufficient notice, that is, as to creditors who give credit after they have notice of the deed.

3 Mass. R.
578, *Towle*
& al. v. *Richardson*. A. D.
1770.

§ 6. 4th. It is agreed, that this deed may well be construed to pass and convey the estate, as to the grantor and his heirs, and such purchasers and creditors with notice as above described, and yet be well construed not to pass and convey the estate from the grantor to the grantee, as to purchasers after such deed made, and creditors of the grantor levying executions on the estate as his, also after such deed made, where neither such purchasers or creditors have any notice of such deed. And Judge Trowbridge justly observed, that "an estate may pass to some purposes and not to others." By a deed to defraud creditors, the estate passes so as to enable the grantee, his heirs and assigns, to hold the land against the grantor and his heirs, but not against his creditors. It is a valid conveyance as between the parties ; but being designed to injure the creditors, it is fraudulent and void as to them." And in *Marshall v. Fisk*, stated Ch. 104, a. 3, s. 11, our Supreme Judicial Court held, that a deed to the grantees, though not recorded when they entered under it, had the effect of feoffment, and conveyed the land "with respect to

3 Mass. R.
580.

CH. 109. the grantor and his heirs, and to all persons having notice of the conveyance," clearly implying that it did not convey the land with respect to those not having notice of the deed ; and the statutes themselves declare this deed good and valid as to the grantor and his heirs, and against creditors who levy their executions, and purchasers, having notice of such deed, on the ground of fraud.

§ 7. 5th. It is now settled law, that a creditor knowing of such deed in fact, or by fair presumption, stands precisely on the ground of an after purchaser having such notice. See said case, *Marshall v. Fisk*. But his attachment must be considered as a prior purchase. But it may be otherwise, with one who is creditor at the time of the execution of the deed, though that be *bonâ fide*, if not recorded. See post.

§ 8. 6th. The great question is, when the grantor has such right and power at the time of making his deed *bonâ fide*, and the grantee neglects to enter by himself or tenant, and omits to record his deed, does the land or estate pass before his entry. In this case also, the deed has different effects in respect to different persons. It passes or conveys the estate to the grantee with respect to the grantor and his heirs, and by the fair implication of the statutes, as that of 1697 &c., which enacts that no deed shall be good and effectual in law to hold lands against any persons, but the grantor and his heirs, unless recorded, and no notice is taken of the grantee's entry, clearly implying the deed is good and effectual in law, for the grantee to hold the lands or estate against the grantor and his heirs, though not recorded, and though the grantee has not actually entered ; and has been invariably our practice from the first settlement of the country ; for if after executing such a deed the grantor has died, remaining in possession, (but not claiming title) the estate has not descended to his heirs, but has been viewed as vested in the grantee as between them ; and if the grantee in such case has died, the estate has descended to his heirs, and his widow has had dower in it, and so have our estates ever been settled in our courts. And Judge Trowbridge, 3 Mass. R. 579, says, "nor can a bargainer by deed convey the land" &c. And in *Marshall and Fisk*, above, "if a second purchaser has had notice of the prior conveyance, notice to him by recording the deed is unnecessary, and the second conveyance is fraudulent;" and the court further viewed the entry by the grantee as notice, and held, the grantor could not convey to one having notice of the prior deed ; and the fair inference is, that to these purposes the estate does not remain in him. On a deed of feoffment before livery of seizin made, the feoffee in the land was tenant at will to the feoffor, as Ch. 4, a. 3. But the

reverse is true of our statute deed *bonâ fide* and duly executed, as between grantor and grantee, though it be not recorded; and if the grantor remain in possession, recognizing his deed, he is tenant at will to the grantee, and he may recover the land of the grantor when he pleases, as is every day's practice, especially on mortgages; and as between grantor and grantee it is not necessary to shew the deed is recorded, as the statute does not as between them require it to be recorded.

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Art. 6.



§ 9. But though this is the case as between grantor and grantee, it is different as to third persons, either creditors or after purchasers. If the grantee take such deed of one having a right to convey, and let him remain in the visible possession, and does not record his deed, unquestionably the land may be taken for the grantor's debt by his creditors, or be sold by him to others, having no notice of such deed; for it is the folly of the grantee to leave the grantor in possession. And "all persons in possession are *prima facie* capable of conveying and purchasing, unless the law has laid them under particular disabilities." And, therefore, if the bargainee without recording his deed, suffers the bargainor to remain in possession of the land, and he sells it to another who has no notice of the first sale, and that deed is recorded before the first, he shall hold the land; because in such case the law supposes the first deed to have been fraudulently made, upon the same principle, that it deems a bill of sale of goods suffered to remain in possession of the vendor to be so;" and the reason is obvious, for the first grantee by not recording his deed, and leaving the grantor in possession, enables him to deceive a second purchaser, having no notice of the first deed, and so is in some measure a party to the fraud; and one so accessory to a fraud shall not hold the land against one wholly innocent and a fair purchaser.

2 Bl. Com.
290.—3 Mass.
R. 575, Trow-
bridge's opin-
ion.

§ 10. But if A have a right to convey, and executes his deed to B in fee of the land, and B enters, as the deed for a valuable consideration and *bonâ fide*, gives him a right to do, he is complete tenant of the land in fee, as to the grantor and his heirs. And the grantee's possession and taking the profits is evidence of such change of property, as will amount to implied notice of the conveyance, and will prevent any other person buying the land of A, or taking it in execution for his debts, so far as such person is bound by notice. Any after purchaser having notice is clearly bound and barred, for livery of seizin was such notice, and our enrolment is a substitute for livery of seizin and such notice; and this is unnecessary where there is notice in fact of A's deed to B, as has been often decided. So other acts serve to give legal notice of one's estate in lands, as well as livery of seizin and records.

See Marshall
v. Fisk, and
opinion of
Trowbridge.

CH. 109. As where A leases land to B for years, and there is no livery of seizin, the lease gives the lessee "a right to enter, and

Art. 6.

2 Bl. Com.
314.

when he enters by force of that right, he is then, and not before, in possession of the term, and complete tenant for years ; and such entry by the tenant himself serves the purpose of notoriety, as well as livery of seizin from the grantor would have done. If so, surely, says Trowbridge, "the entry of the bargainee by force of the deed, which gives him not only a right to enter, but also a right to hold the land against the grantor and his heirs forever, must alike serve the purpose of notoriety." "The lease is not enrolled, nor the deed recorded ; the former may be kept as secret as the latter ; the entry and occupancy which are alike in both, equally serve the purpose of notoriety ; the occupant in both cases is *prima facie* supposed to be the owner of the land, and upon inquiry will be found to be so. No fair purchaser is in such case in danger of being defrauded if he uses the caution he ought to do." Notice is equally important and binding when a trustee conveys an estate to one who has notice of the trust.

2 Bl. Com.
337.

§ 11. But after considering the full effect of such notice in regard to parties concerned, there arises a question that does not appear to be fully decided ; that is, how far the creditors of the grantor shall be barred to attach his estate, or levy their executions upon it, they having notice in fact of his *bonâ fide* deed to A, but not recorded ; and this notice either by the grantee's being in actual possession, claiming and using the estate as his, or otherwise ; or in other words how far the common law deems it a fraudulent act in a creditor in such case to take the estate in execution for the grantor's debt, knowing of his deed to A. There is a clear distinction between creditors who become such before the deed is made, and such as become creditors afterwards, having notice of it. If the latter levy their executions on the estate as the grantor's, they are pretty clearly in the situation of after purchasers with notice of the deed, and the levy must be deemed fraudulent and so void. As to creditors who become such to the grantor while he *bonâ fide* owned the estate, and gave credit to him, trusting to this estate in whole or in part, there is less reason for considering their levy upon it fraudulent and void.

Massachu-
setts, A. D.
1777, Derby
v. Smith.

§ 12. In this case a question of the last description arose. Thus, one J. Putnam was in debt to Derby, the plt., and sold the land in question to Smith, the deft., by deed executed and acknowledged, but *not recorded* ; the deft. entered under his deed, and had possession a year or more, and built a house on it. Derby, on a judgment against Putnam, levied his execution on this house and land. The deft. carried away the house, and for this Derby brought trespass. The grantee be-

ing in possession, under a regular deed, when the execution was extended, the question was if this estate was liable to be taken thus in execution for the debt of Putnam, the grantor. Against the levy it was urged, that the deed raised a use at common law, in the grantee, on the execution of the deed, and then the statute of uses vested the possession in him, and the purchase was complete with respect to the parties to the deed; that the estate was gone from the grantor, even before recording; that he could not enter or recover the estate, for he was estopped to say any thing against his deed; that the estate never could descend to the grantor's heirs; that as the grantee had entered he could convey, and if he died seized, as he was, it would descend to his heirs, hence the estate must be vested in him before the deed was recorded; that the grantor could not convey by a second deed, the first grantee being in open and visible possession, claiming the estate in fee, though his deed was not recorded; for no man can convey land when another is in possession of it, claiming it as his; and if he has not the possession the deed must be delivered on the land, and the grantor, too, must have a right of entry; by the common law, in England, a bargain and sale, without livery of seizin or entry, passed the freehold, without enrolment; that in this case Putnam's deed gave Smith a right to enter and hold the land against the grantor and his heirs, though not recorded; and if the estate be out of the grantor, how can it be taken for his debts, and as his estate? that if it may be levied upon as his estate in fee, it might be redeemed by him paying the debt, and so he recover back the estate to his own use; that he could not be a trustee to the grantee, for it was extended as the grantor's own; and if he paid the debt, he redeemed it as his, and this was to defraud Smith, a fair purchaser. For the plt. it was said, that by our statute a bargain and sale, not recorded, nor accompanied with possession, could not exclude an after purchaser, who could not be presumed to know of the title of the bargainee; that the estate might well pass, and descend, and belong to the deft., as he urged; and he be seized in fee, and have power to convey as he said, with respect to the grantor and his heirs, or after purchasers with notice, and indeed all after-purchasers, as Smith's actual and open possession was notice to all; but otherwise as to Putnam's creditors; that as to them the estate remained his, as his deed to Smith was inoperative and void in respect to them, creditors of Putnam, when he made his deed. Thus the arguments ended in the true question, *was this void as to these creditors?* It does not appear how it was decided.

In *Marshall v. Fisk*, the court said, Adams' deed, and the grantee's entry under it, was as a feoffment as to the grantor and

CH. 109.
Art. 6.

Lit. 296—2
Ins. 266, 272.
—2 Cro. 52.
—1 Vent. 360.
—Hob 222.
—1 Bac. 177.

See 4 Mass.
R. 637, *Farnsworth v. Child*; this point in part settled.

CH. 109. his heirs, "and all persons having notice of the conveyance."

Art. 7. Now all Adams' creditors might well have such notice.

ART. 7. *Is our statute deed recorded equivalent to the ancient feoffment, or the ancient livery of seizin?*

5 Mass. R.
352, Higbee
v. Rice.

§ 1. In this case Parsons C. J. said, that "a conveyance by deed, duly acknowledged and registered, is, by our statute of enrolments, equivalent to livery of seizin;" and if one enter into the land under such a deed he acquires a freehold estate in it, by right or by wrong; and Rice's entry being by wrong was a disseizin.

2 Mass. R.
439, Marston
v. Hobbs.

§ 2. In this case the court held, that the registry of the deed "supplies the want of livery of seizin, only where the grantor has a right to convey." According to this case, if the grantor has no right to convey, the registry has no effect to supply the place of livery of seizin; and so is the statute.

Marshall v.
Fisk, see Ch.
104, a. 3.

§ 3. In this case the court held, "conveyances by deed acknowledged and recorded, made by grantors, having good right to convey, may have the effect of feoffments, without an actual entry of the grantee."

There seems to be no question but that our deed recorded, as a matter of notoriety, is equivalent to a *feoffment*, the very essence of which was livery of seizin; the enrolment is meant to supply the place of livery of seizin, and in its nature, much superior evidence, because certain matter of record ever open to all; and if livery of seizin was endorsed on the deed of feoffment, it remained in the hands of the feoffee, and the witnesses might soon forget the transaction. But though in the above, and other cases, the expressions are general, that our deed recorded is equivalent to livery of seizin, yet it will be found that these expressions were used in reference to notice; and it has never been decided that this deed recorded can work a disseizin, as livery of seizin may; and in this respect the reasons wholly fail; because livery of seizin works a disseizin of a third person only by the feoffor's actually entering on the land, to make it actually *ousting* him, to clear the land, to remove all adverse seizins and possessions, and to prepare the way to make a legal livery of seizin to the feoffee; now in executing and recording our deed there is no such entry, or ouster, or removal, and if the grantee enter under our deed, and oust and remove a third person, it is *this entry and ouster* that disseizes him, and not the deed, or the recording of it. On the whole there is no reason for supposing the making and recording our deed merely, not on the land, ever works an *ouster or disseizin*; but there may be, if the grantor enter and deliver the deed on the land, as in the case of a feoffment with livery of seizin; and then it is the actual entry of the grantor, and his ouster of the third person, that

works his disseizin, and not the execution or recording of the deed ; and this entry and livery of seizin, or delivery of our deed on the land, is void, whenever the grantor's right of entry is gone ; for then his entry is tortious, though he have the right of property, and no title can arise from a tortious act. Where the entry of the feoffor is lawful, his feoffment and livery clears all disseizins.

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Art. 7.

1 Ins. 9, a.—
2 Ins. 672.

These ideas are entirely consistent with the rule laid down by the court in *Marshall v. Fisk* ; for that rule supposed the grantor had “good right to convey,” and this right to convey supposed he was seized, and that there was no adverse seizin or possession in a third person ; of course the deed, in no manner whatever, could work any disseizin, as one must be seized before he can be disseized, and when the grantor is thus alone seized, his deed can no more work any disseizin, for want of seizin in another, than a deed of feoffment, with livery of seizin, on the land, can work a disseizin of any one, when the feoffor alone has the seizin of it. The feoffment works a disseizin only when the feoffor, on his entry, actually ousts one adversely seized ; “and estates of freehold or inheritance cannot be defeated without an entry.”


3 Co. 59, Lin-
coln Col-
lege case.

Cases in which the restrictive clause in our statute has effect.

First. Where the grantee omits to record his deed, and suffers the grantor to remain in possession.

Second. According to Trowbridge, “where land lying waste is sold, and the purchaser neither records his deed, nor enters and makes a visible improvement ; and where reversions, remainders, rents, common, and such like incorporeal things are granted ;—in such cases as these, if the grantor, for a valuable consideration, bargains and sells them again to one, who knows nothing of the former sale, and the last deed is recorded before the first, the estate will pass to the second purchaser, which it would not have done, had it not been for that restrictive clause in the Provincial act, as the statute of enrolments does not extend here. Nothing less than recording the deed, or filing a copy of it in the register's office, proved as the act directs, will, in such cases as these, effectually secure the grantee's title, or be a sufficient caution to people in general against purchasing the estate of him, who is the apparent owner of it ; and therefore if any do purchase such an estate, without notice of the former sale, that clause in the act will enable him to hold it.” In another place he says, the first purchaser holds the estate by his possession, not by his deed not recorded, nor by that and the statute of uses, so that the grantor cannot sell to another ; and the tortious possession of a disseizor will answer the same

CH. 109. purpose, to prevent the estate's passing from the grantor to another purchaser. Taking all these expressions together, it

Art. 8.  rather appears that this able judge thought there is no legal notice of the first purchase, but possession of the land with a visible improvement, or recording a deed, or leaving a copy in the register's office ; for in regard to incorporeal estates lying in grant only, there can be no visible possession ; and as to these, he says, there can be no security against a second sale but such record or copy. But suppose A sells *rent* to B, and I see the original deed, and witness the transaction, and this is proved, can I buy the rent so as to exclude B ? Here I have notice in fact, not from open corporeal possession, from a record of the deed, or from a copy so left. According to many authorities, this notice in fact will make my purchase as fraudulent as the other kinds of notice will. See *Frauds &c.*

3 Johns. R. 375.—13
Mass. R. 464.

Where a deed will enure several ways, the grantee has his election of either. What lands are included in a deed by fair construction.

Gil. Law of Uses, 51.—5
Wood's Con. 62.—3 Wood's Con. 17 to 88.—2 Com. D. 62 to 69 ; must be by indenture.—4 Cruise, 179 ; but no particular words are necessary, 173 to 180.—1 Cruise, 441, 461.

ART. 8. *Our statute deed is very unlike the English deed of bargain and sale. Reasons.*

§ 1. That operates only on a money consideration, and “ as a covenant of the bargainor to stand seized to the use of the bargainee ;” and by 27 H. VIII., this bargainee is “ adjudged to be in the lawful possession and seizin” of the land ; but since the statute of enrolment no land can pass by deed of bargain and sale, unless enrolled within six months after its date in the proper place. But by our deed recorded, the land or estate passes, let the consideration be money or other thing, and whenever registered, if its operation be not defeated by another deed of the same estate, in the mean time ; nor does our deed operate by raising a use in the grantee, but by force of the statutes themselves.

Hob. 136.

§ 2. It is said that the bargainee cannot sell to another till his own deed is enrolled ; but it is also said, that when enrolled both are good ; but, as before stated, our grantee, under our deed, can clearly convey before it is recorded.

2 Bl. Com. 332, 338.—5 Bac. 151.—Cro. Jam. 696.

§ 3. A bargain and sale, in England, is a contract to convey, “ whereby the bargainor, for some pecuniary consideration, bargains and sells, that is, contracts to convey the land to the bargainee, and by such bargain becomes trustee, or seized to the use of the bargainee ; and then the statute of uses completes the purchase, or the bargain first vests the use, and the statute vests the possession. But by that act, the deed must be *indented, sealed, and enrolled* ; the *cestui quo use* was viewed as the real owner of the estate before the statute of uses ; and by that he was actually made owner. Our deed is an instrument *sui generis*, and is made such merely

by force of the statute that creates it, and gives to it its genuine operation ; and as it is not accompanied with livery of seizin, it is not like a feoffment, the very substance of which is livery of seizin on the land conveyed ; and this anciently constituted a feoffment when by parol only ; and it could only convey *tangible substances*, whereof actual possession or seizin could be had, as of lands, houses, or tenements, or corporeal estates only. Hence the feoffment could not be of any incorporeal estates, or hereditaments, as rent, common, or estates lying in grant, as reversions or remainders ; but our deed recorded passes all kinds of estates.

§ 4. Though in one case we use our deed, as the deed of feoffment was used, yet this use has but partially the effects of the feoffment, that is, where the grantor or his attorney enters and delivers our deed on the land. Though livery was usually by turf and twig, this was not essential, as livery might be by delivering the deed itself on the land, in the name of seizin, or other thing, or by mere words, as *enter and enjoy the land &c.* ; and the livery by way of feoffment actually passed the land ; but our grantor's delivering his deed on the land passes it only as to himself and heirs, and others notified of it ; not as to others not so notified. But his entry has the same effect as the ancient entry, to reinstate him in his seizin and possession, where there is an adverse seizin, he having a right of entry ; but his entry and regaining seizin only enables him so partially to convey. This entry of ours, by the grantor, to remove disseizins where any exist, and such like impediments to the deed's operation, so far, is exactly on the grounds of the English entry, and entirely on the same principles of the common law ; but the estate thus passes but in part, by reason of our statute, which requires the deed to be recorded before it can operate to pass the estate to *all* purposes. Hence if I am disseized of land in two counties, in order to regain seizin and to convey it, I must actually enter in both, and if I deliver my deeds on the lands, I must actually do it in both. So if I have several tracts of land in the same county, and am disseized by several persons, of one piece by one, and of another by another, &c. I must actually enter on each, for the same purpose ; for I must defeat each distinct disseizin by entry and ouster of the adverse possessor ; or by entry and being on the land with him, when the law will adjudge the seizin in me who have the right, and not in him seized by wrong. But I regain seizin of all my lands in the same county, in the possession of any *one* man holding them adversely, by actually entering on any part of them in the name of all, though in distinct pieces. Hence an heir may enter into part of the lands descended to him, and make livery of seizin therein, in the

CH. 109.
Art. 8.

1 Burr. 92.—
Co. Lit. 9, 48.
—4 Com. D.
169.—Lit. s.
61.—4 Cruise,
174, 175.

See many authorities, Ch. 104, a. 3.—
Seizin and disseizin, also Entry, also Ouster.

A bargain & sale in England, by a particular tenant, does not destroy contingent remainders, 2 Cruise, 368.

CH. 109. name of all ; and all will pass, being in one county, and the possession of one man or one company of men. And if the lease be to A and B, livery of seizin to one is sufficient, and operates in favour of both ;—a rent may be reserved on it, 3 Cruise, 314 ;—though not enrolled may revoke a devise, 6 Cruise, 108 ; and thereby a tenant to the *præcipe* may be made.

5 Cruise,
832.

Difference between deeds to be recorded in a limited time or not. It is a settled principle where a deed or execution is to be recorded in a certain time, the recording within that time has relation back to its delivery, and against all intermediate acts ; because in this case the statute itself gives that time to the party to record, and if he complies with the statute, he cannot be subject to any disadvantage ; but if no time be limited for the recording, then this has relation back to the delivery generally ; but not as to intermediate deeds fairly obtained ; for when the statute prescribes no certain time, the party keeps his deed not recorded at his peril.

10 Co. 96, 99,
Seymour's
case.—5 Bac.
Abr. 442.—1
Inst. 388.—2
Burr. 702.—3
Burr. 1703.—
1 Wms. Saund.
260 ; other
points decid-
ed in Sey-
mour's case.

§ 5. *Where our covenant of warranty in a conveyance attaches or not.* It is a well settled and general principle of law, that if A own and possess a piece of land, and B, his father, make a deed of it to C, with general warranty, when neither B, the grantor, nor C, the grantee, is in possession, but A is seized and possessed claiming it as his ; and C enters and gets his deed recorded, and B, the father of A, dies, and the warranty descends on him as the heir of B, and he sues C to recover the land of him, A, in this case, is not estopped, barred, or rebutted, by this warranty ; because A's estate in the land is not displaced, divested, or turned to a mere right, at the very time the warranty is made, or before, but his estate continues in him, in seizin and possession, till C enters claiming the land as his ; and no warranty attaches or rebuts, unless at the very moment it is made, the demandant's estate is displaced and turned to a mere right. The principle will be further considered in the chapter respecting warranties. But when the tenant in tail in possession conveys a fee in tail or for another's life, he divests the remainders or reversions and discontinues them.

Co. L. 327.—
3 Co. 85.—2
Lev. 70, 146,
148.

See word *Vol-
untary* in the
Index.
Construc-
tions, 27 El.
c. 4.—Scott v.
Bell, 2 Lev.
70.—Ball v.
Burnford,
Fre. Ch. 113.
—Same case,
1 Eq. Ca.
Abr. 334.

ART. 9. *Fraudulent conveyances and settlements as to creditors and purchasers.*

§ 1. Our statutes of 1641 and 1696, &c. declare fraudulent conveyances generally void, as they would usually be at common law, as to all persons injured by them. But the statute of 13 El. c. 5, declaring conveyances of lands or goods to defraud creditors and others, void, and the statute of 27 El. c. 4, declaring conveyances made to defraud purchasers void, which have been adopted here as common law,

are more particular, and are also useful as explanatory acts, if they contain only the principles of the common law, as to such conveyances, and as it is difficult to abridge them, and preserve the sense, they are cited *verbatim*. CH. 109.
Art. 9.

§ 2. This act recites, that to avoid fained and fraudulent feoffments, gifts, grants, and conveyances, bonds, suits, judgments, and executions, as well of lands and tenements, as of goods and chattels, often contrived with an intent to delay and defraud creditors and others, of the just and lawful actions, suits, debts, damages, and forfeitures, to the hindrance of justice, and the overthrow of all plain dealing: and enacts, "that all and every feoffment, gift, grant, alienation, bargain, and conveyance of lands, tenements, hereditaments, goods, and chattels, or any of them, or of any lease, rent, common, or other profit or charge out of the same lands, tenements, hereditaments, goods, or chattels, or any of them, by writing or otherwise; and all and every bond, suit, judgment, and execution, at any time had or made, or to be had or made, to or for the intent or purpose before declared and expressed, shall be from henceforth deemed and taken only as against that person or persons, or their heirs, successors, executors, administrators, and assigns, and every of them, whose actions, suits, debts, accounts, damages, penalties, and forfeitures, as is aforesaid, are or shall or might be in any wise disturbed, hindered, delayed, or defrauded, to be clearly and utterly void, frustrate, and of none effect; any pretence, colour, fained consideration, expression, or use, or any other matter or thing to the contrary notwithstanding."

§ 3. 27 El. 4 recites, that divers persons, and bodies corporate, after conveyances obtained, and purchases made, of lands, tenements, leases, estates, and hereditaments, for money or other good consideration, had received great loss and prejudice by reason of fraudulent and covenantous conveyances, estates, gifts, grants, charges, and limitations of uses made of, in, and out of lands, tenements, or hereditaments, so purchased, which said gifts, grants, charges, estates, uses, and conveyances, *were meant and intended* by the parties that made the same, to be fraudulent and covenantous, of purpose and intent to deceive such as had or should purchase the same, or else by secret intent of the parties, the same to be to their proper use, and at their free disposition, coloured nevertheless by a fained countenance and shew of words and sentences, as though the same were made *bonâ fide* for good cause and upon just and lawful consideration. For remedy of which inconveniences, and for the avoiding such fraudulent, fained, and covenantous conveyances, gifts, grants, charges, uses, and estates, and for the maintenance of upright and just dealing in pur-

13 El. c. 5; to make settlements valid as to creditors &c., must be fair and considerations adequate.—18 Ves. jr. 84, 91, 92, &c., Pulverstoft v. Dolin v. Coltman, 1 Vern. 294.—2 Wils. 256, Stephens v. Olive.—2 Bro. C. C. 90, 93, statute.—27 El. 4.

CH. 109. chasing of lands, tenements, and hereditaments, it is enacted,
Art. 9. "that all and every conveyance, grant, charge, lease, estate, incumbrance, and limitation of use, or uses of, in, or out of any lands, tenements, or other hereditaments whatever, had or made, or to be had or made, for the intent and of the purpose to defraud and deceive such person or persons, bodies politic or corporate, as have purchased, or shall afterwards purchase, in fee simple, fee tail, for life or lives, or years; the same lands, tenements, and hereditaments, or any part or parcel thereof, so formerly conveyed, granted, leased, charged, incumbered, or limited in use, or to defraud or deceive such as have or shall purchase any rent, profit or commodity, in or out of the same, or any part thereof, shall be deemed and taken only as against that person or persons, bodies politic and corporate, his and their heirs, successors, executors, administrators, and assigns, and against all and every other person or persons lawfully having or claiming by, from, or under them, or any of them, which have purchased, or shall hereafter so purchase, for money or other good consideration, the same lands, tenements, or hereditaments, or any part or parcel thereof, or any rent, profit or commodity, in or out of the same, to be utterly void." But this act is not to affect any conveyance or limitation to use or uses, made upon good consideration, and *bonâ fide*.

Needham v. Beamont.—3 Co. 83.—Bullock v. Sadlier, Amb. 764.—Doe v. James, 16 East, 212.—11 Co. 66.

§ 4. There are two things, and but two, essential to enable an after purchaser to avoid a prior grant or conveyance: 1. The grantor in the prior conveyance must intend fraud: 2. The after purchase must be a fair one, and for a just price. Only a few cases will be considered here, to establish only the general principles on which one conveyance may be valid or not, because another of the same lands or estate may be void or not.

Cowp. 705, Doe v. Routledge.—2 Tann. 69.—See Jackson v. Ham, 15 Johns. R. 263.—Roberts v. Anderson, 3 Johns. Ch. R. 327.—2 Desaus. Ch. R. 304.—Newstead v. Searle.—Preston v. Croft.—280.—Taylor v. Harriot, 4 Desaus. Ch. R. 232.—Serry v. Arden, 1 Johns. Ch. R. 267.—Buprell's case, 6 Co. 72.—King v. Cotton, 2 P. W. 674.

§ 5. This is a leading case on this subject, and was thus: A. D. 1763 William Watson, seized in fee of an estate worth £2000, surrendered it to Routledge, the deft., his nephew, for love and affection only. In 1773, William Watson sold and surrendered the same estate to the lessor of the plt. for £200 actually paid. William Watson died in 1774. Lord Mansfield and the court held, 1. The surrender in 1763 was good and valid on the 27 El., for though voluntary it was not fraudulent. William Watson was not in debt, and had no children; and the act does not speak of a voluntary settlement's being void, but says a fraudulent one shall be; as where an estate is nominally conveyed, "but where in fact it is agreed that the grantor shall keep it to his own use," and he has

creditors &c. Cited the case of *Newstead v. Searle*, 1 Atk. 265, where a woman about to marry a second husband made a voluntary settlement on her children by her first husband, and this was a proper transaction, at the time not intended to be defeated; afterwards her second husband persuaded her to join in a sale of this estate for a valuable consideration; this voluntary settlement was adjudged valid, and the after sale void, though it does not appear that the subsequent purchaser knew of this settlement. But a settler being indebted "is a strong badge of fraud." The surrender of 1762, was entered on the record of the court, and so was notorious, as any one might see it, and not a secret private transaction; and the debt got no credit by the estate. 1 Ves. & Beames, 134.

§ 6. Second. As "to notice in the creditors, it is not material whether a subsequent purchaser has notice or not of a former fraudulent settlement; for it has been determined at law, and therefore must stand, that a man's having notice of a former settlement, which was fraudulent, shall not prevent his avoiding the same, as if he had been ignorant of it; because if he knew of the transaction, he knew it was void by law. 5 Co. 60; Wood's Con. 804.

§ 7. The 7 of Anne enacts, "that a registered deed shall take place of an unregistered deed;" "from whence it might be argued, that if a person know of an unregistered deed, it should not stand against him. Equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside.

§ 8. Third. The deed of 1773 ought to be fair and for good consideration in the understanding of mankind to avail; but this deed was "manifestly a contrivance, the plt's. lessor had notice of the former settlement;" he was, at the request of the seller, to agree to pay £200. "It is a gross fraud, and no purchase at all," "but a gift." As the £200 bore no comparison to the value of the estate, according to this and other cases notice to the after purchaser may not in itself make his purchase void, but yet may be evidence of fraud in him, and of an unfair purchase. See *Fraud*, Ch. 32; see 12 Johns. R. 536.

§ 9. This act of the 27 El. varied the common law in some points; as by that law a fraudulent deed or conveyance was valid against a younger title, though not against an elder right, title, interest, debt, or demand; because when such fraudulent conveyance was made, it was no injury or fraud as to him who afterwards acquired a right, interest, debt, or demand, but was to him who had a right, interest, debt, or demand at the time.

§ 10. An after-purchaser must buy for a valuable consideration on the statute, fairly and without fraud and deceit. Same

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Art. 9.

3 Co. 83.—2
Bro. C. C.
148, Evelyn
v. Templar.—
12 Johns. R.
536.—Taylor
v. Stile, in
Chan. 1763.—
Gooch's case.
—5 Bos. & P.
332.—9 East,
69, 70.—2
Taun. 9.—6
18 Ves. jr. 91,
111.—Ch. 32,
a. 2, s. 8.
See Langdon
v. Tracy.

2 Ch. R. 16.—
2 Johns. Ch.
R. 189, Dey v.
Dunham.—
Leech v.
Leech, 2 Ch.
Ca. 249.

Twyne's
case, 3 Com.
D. 260.—
Yelv. 196.

3 Co. 80.—
3 Com. D.
264.—2 Bac.
Abr. 607.

CH. 109. case. As where a father made a fraudulent settlement on his son, who sold the land for a good consideration, and afterwards the father sold it to A. And the court decided, that A could not avoid the sale made by the son. So a conveyance originally voidable was made valid by matters *ex post facto*, as by the son's sale to an innocent purchaser. See *Goodale v. Nichols*; *Sulton v. Lord & al.*

Art. 10.

§ 11. To make a settlement void by the 27 El. as against purchasers, the grantor himself must intend to deceive purchasers; so is the preamble, and so is the body of the act; or he must mean secretly to reserve a use. This statute avoids no deed made on good consideration *bonâ fide*.

§ 12. Hence, to enable an after purchaser to avoid a prior sale or settlement, this prior one must be: 1. Fraudulent: 2. The grantor or seller must intend a fraud: 3. The subsequent purchaser must buy for a valuable consideration in the common understanding of mankind; his price paid must not be a colour or mere cover: and 4. He cannot avoid the former, if at the time it was intended a real and fair transaction. As to what is a voluntary settlement, any conveyance executed by a husband in favour of his wife or children after marriage, which rests wholly on his moral duty to provide for them is voluntary, and is void by 27 El. as against purchasers.

§ 13. And on this act a fraudulent deed is void as to a purchaser, though he is informed of it, and he may avoid it in evidence. As where one Bullock made a fraudulent deed to A, B, and C on the 27 El., and then offered the same land to one Standen, who got notice of it, and then purchased; and the court held, he might avoid it; "for the notice of a purchaser cannot make that good which an act of parliament has made void as to him." Here also the fraud was in the grantor. Bullock's deed had been good at common law if A, B, and C were innocent. How far an after purchaser may on the 27th of El. avoid a prior voluntary settlement was long a question. 4 Dallas, 304.

6 Co. 61 —
5 Co. 60,
Gooche's
case.—2 Bac.
Abr. 606.—
Roberts on
Frauds, 596.
—2 Saund. 7,
note 4, Read
v. Livingston.
—3 Johns.
Ch. R. 488.—
Finch, 146.—
Cowp. 278.—
Cro. J. 158.

2 Mass. R.
506, Norcross
v. Widgery.—
Same principle,
10 Johns.
R. 457, Jackson
v. Burgett. And a
court of law
may examine
the notice or
fraud; also
14 Mass. R.
296.

ART. 10. *Deed &c. where fraudulent and void.* § 1. A second deed of the same land is void, if the grantee have notice of the prior fair one, though not recorded; but then this notice and so fraud in the second grantee must be very clearly proved. As in an action of covenant broken, one Hankerson 1791 was seized in fee and in possession, and that year gave a deed to S. Norcross under which the plt. claimed, recorded March 26, 1793, and Oct. 12, 1792, he mortgaged the same lands to Mary Hussey, by deed recorded Oct. 14, 1792; and under Hussey the deft. claimed. Judgment for the deft.; for when Mary Hussey took her deed she had no express notice of the sale to S. Norcross; and there was no evidence of

implied notice, for when she took her deed Hankerson lived on the premises; but if S. Norcross had then been in open visible possession, this had been notice, and her deed void. 1 Caines' R. 32; 8 Johns. R. 137; 1 Burr. 474; 1 Stra. 664; 3 Co. 77. CH. 109.
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§ 2. In the year 1775, Genger Herrick was seized in fee of the demanded premises, under whom both parties claimed, the plt. under a deed from her to Andrew Putnam in 1776, not to be found, the deft. under a levy for the debt of Israel Hutchinson, one of her heirs, made in 1791. There was a decision that no *parol* evidence could be admitted to prove the contents of her deed to A. Putnam. In this case the plt. was in possession under his regular deed from A. Putnam, acknowledged and recorded in 1777, when the deft. levied on the estate, but there was no evidence she knew of Herrick's deed to A. Putnam, or that she was privy to the suppression of it. The plt. justly viewed the levy as giving her seizin, and his right of entry gone, and hence sued on his seizin within thirty years. A Putnam was in possession in 1776, and no evidence was admitted of the declaration of Mrs. Herrick as to her deed to A. Putnam, nor of the declarations of his wife as to it; and a justice rule, report and judgment thereon, between the plt. and the said Hutchinson, finding the title in the plt. was not admitted in evidence; for the deft. was no party to it, nor did she claim under Hutchinson by purchase of him, nor was she his heir, but she claimed under a levy on his estate, and so adversely to him. The title deemed valid &c. Mass. S. J.
Court, Nov.
1792, Putnam
v. Jeffrey.

Bull. N. P.
254, 294.—
Gilb. L. E.
82.

§ 3. This was a plea of land—land in Danvers. In 1778 the plt., Andrews, was seized in fee, and conveyed to Jonathan Stacy by deed, duly acknowledged and recorded. In 1779, he convey by deed, as was said, to Andrew Putnam. This deed was not to be found, and said, to be suppressed by Putnam; he conveyed to Cutler by deed duly acknowledged and recorded with warranty, and he in 1781 to the plt. In 1782, Flagg, the deft., having a debt of about £200 against Stacy, levied his execution on this land as his, though Flagg had heard that Stacy had given a deed of it to Andrew Putnam, and the plt. was in possession. The court decided, that the plt. could not be admitted to give *parol* evidence that Putnam fraudulently suppressed Stacy's deed to him, unless he first proved that the deft. was privy to the suppression; nor *parol* evidence to prove the contents of it. Verdict for the deft. This was a correct decision; but had Stacy's deed to Putnam been found, though not recorded, the levy had been void, because Flagg, the creditor, had heard of the deed, and especially because he found the plt. in possession. See the following case, (on the ground Flagg gave his credit after he heard of Stacy's deed to Putnam.) Mass. S. Jud.
Court, Nov.
1784, An-
drews v.
Flagg.

CH. 109. § 4. June 11, 1806, John Farnsworth seized in fee, *bonâ fide*, and for a valuable consideration, by deed conveyed the

Art. 10.

4 Mass. R. 637, Farnsworth v. Childs.

A sells lands to B in Vermont, he neglects to record his deed, then A sells to C with notice of B's deed, and C immediately records his deed; C's deed is fraudulent and void as to B. Chipman, 63. *Aliter* if to C without notice.

land in question to James Farnsworth, the plt.; James and William Brazer were partners in trade; James Brazer took the acknowledgment of the said deed and read it June 13; said John Farnsworth being infirm remained in possession, but to the plt's. use; this deed was recorded Oct. 1807. But previously, June 1807, the said partners got judgment against said John Farnsworth, the grantor, and the said William Brazer caused the execution to be levied on this land as said grantor's, and this execution was returned and recorded before the said deed was, and seizin and possession was given to the said William Brazer for himself and partner, the said William having no knowledge of the said deed; and as his servant, the deft., entered and cut and carried away the hay &c. Judgment for the deft., for though notice of the deed to one partner was notice to both and good, yet as the deed was read &c. two years before the levy, and the grantor remained in possession openly and visibly, the said partners had a right to consider him as owner. And also held, the first grantee must take possession of the estate or record his deed in a reasonable time, or the second purchaser may presume it not *bonâ fide*, or a conveyance. It may also be observed upon this case, that the notice to the judgment creditors, though only that of reading the deed by one of them, was at the time sufficient notice, and to both: 2. That a levy of an execution with notice of a prior deed, is on the same principle as a purchase by deed: and the cases of Putnam v. Jeffrey, Andrews v. Flagg, and other adjudged cases have proceeded on the same principle, though second purchase with notice of the first deed not recorded be void, yet if the second purchaser convey to A, and he is a fair and innocent purchaser, his title is good. 14 Mass. R. 295.

The same rule holds in equity; therefore, if B purchase an estate, with notice of a prior incumbrance not registered, he is thereby bound, though he first legally records the deed. The intention of a registry act is to give notice of prior incumbrances or purchases to subsequent purchasers and mortgagees; hence, if a person has notice in fact of the prior estate or incumbrance, it is not a secret conveyance by which he can be prejudiced, he has the knowledge provided for by the registry acts, when he has this notice he may be on his guard. Cases, Stroud v. Lockhart, 4 Dallas, 153; Henry's lessee v. Morgan, 2 Bin. 501; Roberts v. Stanton, 2 Mun. 135; Lambert v. Nanny, 2 Mun. 106; Berry v. Mutual Ins. Co., 2 Johns. Ch. R. 607. See art. 4, s. 22; and s. 1, this article; Eyre v. Dolphin, 2 Ball & Beatty, 290; Forbes v. Nelson, 2 Bro. P.

Ch. 425 ; 2 Eq. Ca. Abr. 482, pl. 19 ; Chival v. Nicholls, CH. 109. Stra. 664 ; 1 Burr. 474 ; 1 Eq. Ca. Abr. 357, pl. 11 ; Do. Art. 10. 358, pl. 12, Blades v. Blades ; Hine v. Dodd, 2 Atk. 275 ; 3 Ves. jr. 478, 485.

On the other hand a fair purchaser is protected in equity as he is in law ; therefore, if A have a title under a fraudulent sale, and B purchases of him *bonâ fide* for a valuable consideration and without notice, B holds the estate in equity. Cases, Basset v. Nosworthy, Finch, 102, Jerrard v. Saunders, 2 Ves. jr. 454, 458 ; held, a deft. stating by answer a purchase for valuable consideration without notice, shall not be compelled to answer further ; several cases cited ; Frost v. Beekman, 1 Johns. Ch. R. 300. Same principles Duval v. Bibb, 4 Hen. & Mun. 113 ; Wilcox v. Calloway, 1 Wash. 41 ; 7 Cranch, 2 ; 2 Ch. Ca. 208 ; Hughson v. Mandeville & al., 4 Desaus. Ch. R. 87, and 479. But a purchaser cannot protect himself by getting the legal estate of known trustee ; Saunders v. Dehew, 2 Vern. 271 ; as in this case he has or may have notice of the equitable interest in the *cestui que trust*.

§ 5. This was a plea of land. May Term, 1810, the demandant got judgment against one Conner for a debt, and levied on this land demanded, as his in regular form. June 4, 1780, Conner by deed conveyed *bonâ fide* to one Doore, acknowledged but not recorded till after the demandant's attachment. Doore entered under his deed when executed, built on, enclosed and occupied the land till Feb. 27, 1796, when he conveyed to the tenant, Heard, the part he defended, recorded 1798 ; he entered under this deed and continued in quiet possession ever since &c. ; also the demandant before he attached the land was informed of Conner's conveyance to Doore, and of the contents of the deed, the consideration, and the possession of Doore under it, and of the tenant for twenty-nine years before the plt's. attachment. Demandant nonsuit ; for his execution conveyed to him no title, for Doore's entry, building, exclusive possession, and conveyance to the tenant repelled every idea of fraud, and was "conclusive evidence of a seizin and title," and notorious. A credit to Conner given with a view to this land for payment, thus exclusively in Doore's occupation, "would be in itself a fraud." Ch. 172, a. 6, s. 5 ; a fair purchaser's open possession is equivalent to recording his deed.

10 Mass. R.
60, Prescott
v. Heard.

§ 6. Nothing passes by a deed made for a valuable consideration to be paid when it should take effect, and not otherwise, and it purported to convey a certain part of a mill in Boston with the land &c., "provided the said deed should not take effect, or be made use of until the said mill-pond should cease to be employed for the purpose of carrying any two mill wheels."

12 Mass. R.
93, Welsh v.
Foster & al.

CH. 109. The estate was not to vest or the freehold pass but in *futuro*,
 Art. 10. and the contingency might not happen, if ever, until beyond
 ~~~~~ the time allowed for the vesting of estates on a future contin-  
 gency.

13 Mass. R.  
 443, Flint v.  
 Sheldon.

§ 7. Writ of entry on the demandant's seizin &c. He relied on the tenant's absolute deed to him of the land, duly executed and acknowledged Dec. 12, 1809, and recorded the 14th, with general warranty; the same 12th day he leased the land to the tenant for one year.

Held, that such a deed could not be avoided or controlled in its construction by an averment or *parol* evidence of usury, or any condition or trust not expressed in the deed.

15 Mass. R.  
 210, Goodwin jr. v.  
 Hubbard &  
 al.

§ 8. *Conveyance fraudulent and no trust.* Writ of entry on the plt's. own seizin. Joseph Goodwin, the father of the demandant, A. D. 1807, paid for the lands demanded, but caused them to be conveyed to Elkanah Watson, and they agreed Watson might retain them to his own use, if he chose, paying Goodwin senr. the purchase money in three years, otherwise Watson to convey them to him. Watson elected to convey them, and in 1810, prepared a deed to convey to Goodwin senr., but he prevented its execution and declined accepting it. He afterwards induced Watson to give him his negotiable note for the amount of the purchase money, promising Watson he would not demand payment in cash, but accept a conveyance of the land in discharge of it. The avowed motive of Goodwin senr. was to keep said property out of the reach of his creditors, and to prevent Watson being summoned as trustee, Goodwin then being insolvent and owing many debts. He afterwards assigned the note to his son, the demandant, to enable him to receive the money, or take a conveyance of the lands for his father's benefit, to keep them from his creditors. Jan. 7, 1812, the son received from Watson a conveyance accordingly in fee. In 1813, the tenants attached these lands as the estate of Goodwin senr. and levied on them in 1814; and judgment for them. The evidence to prove these facts was all left to the jury, whose verdict was for the tenants. Said Watson's deposition was admitted to prove them. The demandant objected to the admission of it; and it seems well admitted against the demandant; because to prove a gross fraud he was party to, and in favour of the persons he meant to cheat, his father's creditors. It is a general rule, if A practise a fraud to cheat B, B may, by *parol* evidence, as against A, prove his fraud. See ch. 32, as to fraud; and ch. 93, as to *parol* evidence &c.: 2. The father was not *cestui que trust*, for if so his son was trustee with title; but his fraud made the conveyance to him void: 3. No resulting trust to the father, for there was no writing to create

it : and none by implication of law, as there was "nothing in the deeds from which such implication can arise." See *Northampton Bank v. Whiting*, ch. 32, a. 11 ; and *Alden v. Jenny*, and other cases in that chapter &c. : 4. The conveyance to the son was valid against Watson and his heirs : 5. Nor could the son avoid it to any one's prejudice, as he was a party to the fraud : 6. If he could avoid it, yet he could not recover against the tenants, being in possession by due process of law : 7. The son was not in the land by disseizin, for he disseized no one, having entered by consent of all interested in the land : 8. As he entered on a fraudulent deed, to cheat the tenants, neither his deed nor entry could avail him against them : 9. Hence he had no seizin by which he could disturb their possession : 10. In fact he had no title or seizin ; they had possession as above.

CH. 109.  
Art. 10.

§ 9. If A agree his minor son may go to sea and have his earnings, but A receives them, and buys lands and takes the deed to his son, when A was in good circumstances, and the price being equal to such earnings ; the son's title is good against his father's creditors, such before said deed was taken ; though also the father had possession and cut trees &c., and no evidence how the income was applied. Deed not fraudulent, nor did it create a trust estate in the son of which his father was *cestui que trust*, for the reasons also stated in the last case ; no writing &c., and no trust can be proved by parol. Father might well occupy for his son, as he was at sea &c. Second patent is invalid, knowing of the first, till it be avoided in chancery or by *scire facias*, by the second patentee. See Land Actions.

12 Mass. R.  
376, *Jenny v. Alden jr.*

§ 10. A owed a large debt to a bank, and owned valuable lands ; his notes for it to the bank were transferred to B, as its agent in fact, in trust for it, though not so expressed. B sued A on them, got judgment and levied his execution on said lands, and mortgaged them to a second bank to secure a debt due to it from said first bank. C levied on these lands as the estate of it, by a resulting trust to it, and B trustee. Held : 1. B was seized of the lands in his own right : 2. That he did not hold them in trust for said first bank, as none was expressed in the record, and none could be proved by parol, for the reasons in sections 8 and 9 ; nor was there any fraud in B's conduct.

10 Johns. R.  
23.

12 Mass. R.  
104, *Northampton Bank v. Whiting.*

Though these decisions in sections 9 and 10, as to fraudulent deeds, were made in a State court, they were made in relation to the 13 & 27 El. and on general principles of law. See ch. 32.

§ 11. *General rules as to construing deeds of conveyance* &c. : 1. Rules applicable to all deeds : 2. Only to some

4 Cruise, 416  
to 438,—  
Shep. T. 453.

CH. 109. one kind of deeds. One general rule has ever been invariably, that is, to construe a deed as near the apparent intentions of the parties as possible, consistent with the rules of law, contrary to which no deed can be valid to the purpose expressed ; as if A convey lands to B and his heirs for twenty-one years, B's executor has it, for the law forbids a chattel to go to the heir ; yet in such case does not make the deed void. 2d. Rule, if no ambiguity in the words, no exposition is to be made contrary to them ; yet their precise meaning must yield to the plain sense. 3d. Neither bad Latin nor bad English makes a deed void. 4th. The construction is on the whole deed : 5th. And most strongly against the grantor, or releasor, &c. except the releasor's meaning be explained by a particular recital ; but a deed indented, executed by both parties, is the deed of all. 6th. The law never, if possible, construes a deed to do wrong : 7th. Sometimes rejects words : 8th. Or supplies them, *Lloyd v. Lord Say and Sele*. 9. When a deed cannot operate in the way intended it shall operate in some other way as near as possible, sundry cases. See *Legal Operation, Index* ; and *Marshall v. Franks & al.*

ART. 11. *Proprietors of common and undivided lands,—conveyances by them &c.*

§ 1. Ch. 108, art. 3, it will be observed that such proprietors are, by several statutes, empowered to get themselves incorporated on a justice's warrant, and when incorporated, to act as a body politic, many of which have long existed in this State. They have ever been impowered clearly to sell as a corporation, by vote recorded by their clerk, and by deed signed and acknowledged by him in behalf of the corporation, or property, with their corporate seal affixed, the undivided lands of the corporation for the purposes of bringing forward, settling, and improving their lands ; but it was long a question, if they could sell or convey for other purposes, as merely to turn their lands into money, though the practice had generally been to do this.

§ 2. In this case in the county of York, the question was judicially made in an action to recover possession of a certain tract of land in Lebanon, and the court decided, that under an authority of an ancient Colony statute to them to dispose of their common and undivided lands, the practical construction had been to sell any part of them to a stranger, and that the court will not now make a different construction. The deed under which the deft. claimed was dated Nov. 13, 1780, made by a committee of the proprietors of the township of Lebanon, appointed April 7, 1778, with full power to sell any of their undivided lands in that township at their discretion. Their deed conveyed the premises to one Jonathan C. Chad-

Art. 11.  
1 Inst. 36.—  
4 Desaus. Ch.  
R. 386.—  
2 Saund. 167.  
—3 Salk.  
341.—Co L.  
183.—Ch.  
123, a. 3, s. 9.  
—3 Atk. 136.  
—10 Mod. 40.  
—4 Cruise,  
420.

See Ch. 108,  
a. 8, s. 20 to  
27.—Ch. 68,  
a. 3, s. 6, a. 4,  
s. 5.—Ch 76,  
a. 10, s. 11,  
12.

2 Mass. R.  
476, Rogers  
v. Goodwin.

burn in fee, "with a warranty against all persons claiming by or under said proprietors, or any persons whatsoever." He sold to the deft. Sept. 30, 1787, in fee; he entered and built a house &c. on the land, and made improvements, and with his family was in possession when an execution against the proprietors was, in 1803, levied in favour of the plt. and seizin and possession delivered to his attorney. Judgment for the deft.; and the court observed, that by a colony law, passed in 1636, authority was given to the freemen of every town to dispose of their lands 2 M. L. 966. And in the preamble of the act of 1753, 2 M. L. 995, it is recited, that proprietors of lands, lying in common, have power "to manage, dispose, and divide the same, in such way and manner as hath been or shall be concluded and agreed on by the major part of the interested;" that in this power to dispose of lands the practical construction had been that a power was included to sell and convey the common lands, and very large estates were held under such sales.

CH. 109.  
Art. 11.

§ 3. In this case the court decided that copies of ancient proprietary grants are admissible in evidence, without evidence that the meetings at which made were legally called or holden.

2 Mass. R.  
538, Pitts v.  
Temple.—11  
Mass. R. 169.

Proprietors of a township may sell the undivided rights of individual proprietors to pay the taxes laid by the propriety, but not lots holden in severalty by assignees of individual proprietors.

§ 4. This was an information for an intrusion into the lands of the Commonwealth against the defts. as a corporation. The defts., as a corporation, and by the name of Pejepscot Proprietors, pleaded not guilty; also a former judgment of this court on an information of the Commonwealth against Josiah Little Esq. and said proprietors, admitted a party as such corporation, concerning the same lands, rendered on a report of referees. This report contained a stipulation or condition that the defts. should, in six months, execute a release to the Commonwealth of certain lands above a certain line, drawn near the twenty miles fall, so called, in Androscoggin river; the report awarding to them lands below; and they also pleaded judgment was entered agreeably to the report. The Commonwealth replied, that the six months were elapsed, and that the defts. did not, within the six months, execute the release; and the replication was adjudged good. The defence set up was that the referees had no power to award such a release, and so that part of the award was void; but the court thought otherwise.

7 Mass. R.  
399, Commonwealth v.  
Pejepscot  
Proprietors.

It is to be observed that in this information the proprietors, so incorporated on a justice warrant on the said act of 1753, see ch. 108, were deemed able to buy, divide, hold, refer,

CH. 110. and sell lands, to all intents and purposes. In the first information they claimed three or four millions of acres of land on both sides of Androscoggin river in Maine. The first information was filed against Josiah Little Esq. and the corporation was admitted &c. This last information stated that the late province of Massachusetts-Bay, within forty years last past, viz. July 4, 1776, was seized and possessed of a certain tract of land in the county of Cumberland, called Province lands, bounded &c.; and the said province continued so seized, until succeeded by the Commonwealth, who ought now to be in the actual possession &c.; "nevertheless the Pejepscot Proprietors have, within the term of twenty years past, with force and arms, illegally entered upon the said tract of land, and disturbed, and still continue to disturb the Commonwealth in the possession of the same, and have taken, and still continue to take the profits thereof in contempt," &c. It is to be observed this information states an illegal entry with force and arms, by a corporation, and this is the usual form as to this kind of corporation; nor does it state a dis-seizin, but only a disturbance of the Commonwealth; this is also the usual form. The first plea by the defts. was, not guilty, and the second plea was in bar, and stated the former information, and the proceedings thereon. Replication and judgment as above. A conditional resolve of the legislature and the condition not performed by the Pejepscot Proprietors, the resolve has no effect.

3 Mass. R.  
106, Little v.  
Frost.

## CHAPTER CX.

### PRINCIPLES OF ENGLISH CONVEYANCES ADOPTED HERE.

2 Bl. Com.  
440, 441.—  
Law Gram-  
mar, 115.—  
Doct. & Stud.  
162.

ART. 1. *By gift.* § 1. A conveyance of estate by gift has ever been adopted in Massachusetts; but the deed to be valid must by our statute be signed, as well as sealed and delivered, and acknowledged and recorded. This deed here as in England is good without any consideration, and the word *gift* means only the transferring property to another, without a valuable consideration, and applies to things moveable and immoveable. Sometimes it is by act of law, as where on a marriage the law gives the goods of the woman to the husband. A proper gift is attended with delivery of possession, and takes

effect immediately, and the donee is put into the possession of the thing directly. It is then a gift executed in him, and cannot be retracted, though done without any consideration; but when immediate possession is not given, it is a contract. But a gift is void when prejudicial to creditors, or when made by an infant, or by one in duress &c., or by one imposed on by false pretences or taken by surprise. The material difference between gift and grant is, the former are always gratuitous, the latter on some consideration or equivalent. And whenever a consideration is expressed, as blood or natural affection, or 5s. nominally paid, or even a peppercorn rent reserved, it converts the gift if executed into a grant. To make a gift valid there must be an immediate possession of the thing delivered to the donee; if A say to B, I give you my corn growing in that field, this is not sufficient without delivery. 2 Johns. R. 52, 57, *Noble v. Smith & al.*

CH. 110.  
Art. 2.

3 H. VII. c. 4.

§ 2. By this statute of H. VII. all deeds of gift of goods made in trust to the use of the donor shall be void. And by 13 El. every grant or gift of chattels, as well as of lands, "with intent to defraud creditors or others," shall be void as against such persons to whom such fraud would be prejudicial, but good and valid as against the grantor himself. A gift or grant vests a property in possession, a contract in action; but no gift or grant can be by deed, but to him who is party to it, except by way of remainder. 13 El. c. 5.

§ 3. All conveyances of property by contract and consent, even gifts, may include covenants made to certain purposes, which usually have their force and effect, according to the nature of the instrument in which they are inserted.

§ 4. A parol gift without some act of delivery does not change the property. A parol gift of land creates but a tenancy at will. 1 Johns. Cas. 33. To make a valid gift there must be an immediate delivery to the donee. 2 Johns. R. 52. And till the thing be so delivered it may be revoked. 7 Johns. R. 26. And no action lies on a parol promise to pay money as a gift. *Id.*

2 Stra. 955.—  
1 Phil. Evid.  
11.  
*Pearson v.*  
*Pearson.*

§ 5. Delivery of possession is essential to constitute a valid gift, but a jury may infer a delivery from circumstances. 10 Johns. R. 293.

ART. 2. *Grants.* § 1. Deeds of grant are one species of conveyance in Massachusetts, and all the United States brought from England; but varied here by statutes, as all our conveyances of lands or interests in lands are in regard to signing, acknowledging, and recording. This species of conveyance is very material to be considered, not so much on account of the forms of it, as of the things that may or may not be granted.

## CH. 110.

## Art. 2.

2 Bl. Com.  
317.—  
5 Wood's  
Con. 10, 11.—  
4 Cruise, 111.  
2 Bl. Con. 20,  
106, 317.—  
Noy's Max.  
83, 85.—  
4 Cruise, 142.  
—4 Cruise,  
111, 113.—  
4 Cruise, 421.  
—5 D. & E.  
221, Shove v.  
Pinche.

§ 2. All tangible substances or corporeal things, as houses and lands, are considered as lying in livery, and anciently were conveyed generally by livery of seizin: and others, as commons, estovers, rents, reversions, remainders, ways, &c. called *incorporeal* things, are viewed as lying in grant, and to be passed or conveyed merely by delivery of the deed at common law, and generally by our statutes by recording also, in matters appertaining to lands. As these incorporeal things are accidents which adhere in, and are supported by the tangible substance, and may belong to it or not, without any visible alteration in it; and are in their nature collateral to and issuing out of lands and houses, the owner of these incorporeal hereditaments cannot have any property or demesne in these things themselves, the houses and lands, but only something derived out of them. Hence, these incorporeal things are incapable of passing or being conveyed from one to another by livery or delivery, and can pass only by virtue of the deed. They are not things "whereof livery can be had;" and the reason of the difference is given by Bracton, who says, "*traditio nihil aliud est, quam rei corporalis de persona in personam, de manu in manum translatio aut in possessionem inductio; sed res incorporales, quæ sunt ipsum jus rei vel corpori inherens, traditionem non patiuntur*," and "these, therefore, pass merely by delivery of the deed." A grant of a reversion of lands, for instance, with attornment (when attornments were in use) was deemed as notorious as a feoffment with livery; the operative words in a grant "have given and granted," *dedi et concessi*; but "it is not necessary the word *grant* should be used in a grant," and any words will do that express the parties' intentions. 4 Cruise, 112. "It is sufficient if the intention to grant be manifested by a deed;" hence, "the words *limit and appoint* in a deed, may operate as words of grant, so as to pass a reversion." With respect to who may be grantor or grantee, see a former chapter, and 4 Com. D. 293, 294, 295. A release may be allowed to operate as a grant.

4 Com. D.  
295, 296.—  
2 Roll. 46,  
48.—7 Co.  
28.—Hob.  
132.—Perk.  
Grants, 65,  
66.—Noy's  
Max. 83, 84.—  
5 Cruise, 336.

§ 3. With respect to what may be granted or not, in addition to what has already been stated, it may be observed that any present interest in lands or tenements may be granted, as rent, common, or franchise, as a fair or market. So if the interest in the thing granted be certain, the grant will be good, though the thing itself be contingent and uncertain; as if the lessor grant to the lessee all the emblements which he shall have at the end of the term it will be good; for he has an interest in all that will be, though it is uncertain whether there will be any emblements. So of the fruit of trees, or wool of

sheep the grantor owns, though the fruit or wool is to grow after the grant. CH. 110.  
Art. 2.

§ 4. But a *chose in action*, a bare right or possibility cannot be granted. So a mere personal privilege cannot be granted; as if I lend my horse to A to ride a journey, he cannot lend him to another. Nor can a thing uncertain be granted, as *estovers* uncertain. If I have my sheep for two years, I cannot grant them during the term. So if the lessee covenant to leave fifty sheep at the end of the term to the lessor, he cannot grant them before the end of the term; for till that time he has no property in them. And a man cannot grant a thing he has not, though he afterwards possess it, but in some special cases by way of *estoppel*; as if a man grant a reversion by fine, and afterwards purchase it, the grantee shall hold it, for the grantor is estopped by the record to claim it; and so if he grant it by deed.

What lies in grants cannot be discontinued.  
5 Cruise, 226.

§ 5. Anciently, lawyers made many nice distinctions as to what grants would be valid without deed, and what only by deed; but since the 29 Ch. II. c. 3, called the statute of frauds in England, and our statutes before cited, these distinctions have become unimportant; here especially, as to lands or any interest in them, because by a statute passed as early as 1641, no conveyance or mortgage of any land, or of any hereditament was of force, (the grantor remaining in possession) but against him and his heirs, but by deed recorded. In fact, as to third persons, no conveyance of any hereditament is valid by our law, but by deed acknowledged and recorded, or except by deed duly executed, with legal notice thereof; a trust arising by construction or operation of law excepted. And no contract to convey any land or interest in land is valid, unless in writing signed.

And generally, as things lying in grant could not at common law pass without deed, so the grantor could not grant any larger estate than he had; hence, "no grant by deed can forfeit things lying in grant."

Co. Lit. 252

§ 6. Grants may be good, except as to certain persons; as "an alien may be a grantee," but if the grant be of lands in fee simple, for life or years, the king will have them; so will the State here on proper process, except in some few cases of treaties. On the same principle, one attainted of treason may be a grantee, but the king may have the lands granted if he will. So persons outlawed in personal actions may be grantees of lands or goods, but the king will have the profits of the lands and the property of the goods. A grant must be certain or it is void. Noy's Max. 83.

5 Wood's  
Con. 17.

§ 7. By Massachusetts statute outlawed persons are disabled to bring any civil action, and forfeit the issues of their

Mass. Act,  
Oct. 2, 1782.

CH. 110. lands for life, if the outlawry continue so long not reversed ;  
*Art. 3.* and if no greater punishment be annexed to his offence charg-  
 ed in the bill on which he is outlawed ; but if a greater offence  
 be charged, that punishment and disability is his.

2 Mass. R.  
 179.—11 &  
 12 W. III. c.  
 6.

§ 8. And by the 11 & 12 W. III. c. 6, adopted in this State, it is provided, that any person being the king's natural born subject, within any of his dominions, may inherit and be inheritable as heir to any hereditament, and make his pedigree and title by descent from any of his ancestors, lineal or collateral, though the father or mother, or other ancestor of such person, "by, from, through, or under whom" he makes or derives his title or pedigree, be an alien ; as fully as if such father, mother, or ancestor, "by, from, through, or under whom he" makes or derives his title or pedigree, had been naturalized, or a natural born subject ; and by 25 Geo. II. c. 39, such person must be in being at the time of the descent. It has been held, that if an alien buy land in fee, and die, his lands not being seized &c., leaving children &c. born citizens, they will inherit it. And in our law and practice an alien may purchase, hold, and grant lands, and on his death they will descend to his heirs any time before taken to the use of the Commonwealth upon an inquest of office or other judicial process causing it to become seized thereof. Where a grant will not be presumed, Ch. 94, a. 3, s. 5.

When a deed  
 may enure  
 different  
 ways the  
 grantee has  
 his election  
 how to take.  
 4 Cruise, 423.

8 Johns. R.  
 385, Jackson  
 v. Cory.

§ 9. To make a valid grant it must be to some corporation, or to some individuals by name who can take by force of the grant, and hold in their own right or as trustee.

Noy's Max.  
 84.

§ 10. A thing that cannot begin without deed, cannot be granted without deed, as a rent charge, fair, &c. Every thing not given by delivery of hands must be passed by deed. All things incident to others pass by the grant of them to which incident.

### ART. 3. *Leases.*

More of leases,  
 see Ch.  
 133.—Mass.  
 Act, Mar. 10,  
 1784.

§ 1. These, in this State, are generally on the same principles as in England, except if for more than seven years they must be recorded ; and if other than *at will*, they must be in writing signed. And it is conceived, that as a lease for more than seven years must be acknowledged and recorded, and is ranked among the conveyances declared void unless the deed or deeds &c. be recorded, it must be a deed signed and sealed. Except also we have not the English restriction of a lease to three lives ; and as the tenant in tail here, in most cases, can alien the whole estate, as well as the tenant in fee simple, such a restriction is not necessary. Except also there never has been a process of distress for rent in this State ; but the remedy has been only an action on the lease, as *covenant, debt, or assumpsit*, according to the nature

of the contract. A term for years may commence here, as in England, *in futuro*, though it is said a freehold cannot. A lease that will endure more than seven years from the date, must be recorded, though the term in it is for less than seven years, being made to commence *in futuro*. 15 Mass. R. 439, *Chapman v. Gray*. On a lease reserving rent, payable quarterly, with a proviso if it be in arrear twenty-one days after day of payment, being lawfully demanded, lessor may re-enter: Held, if five quarters be in arrear, and no sufficient distress on the premises, lessor may re-enter without demand. 3 Maule & S. 525.

CH. 110.  
Art. 3.

The statute of 32 H. VIII. c. 28, as to *husbands and wives*, making leases of the wives' lands for three lives, or twenty-one years &c., it is useless in this State, as here the wife by joining with her husband may dispose of her whole estate. A lease cannot be of the whole estate; see 1 Cruise, 243, &c.

§ 2. The English principles of law in regard to leases, are, on the whole, not much a subject of attention in this State; comparatively but few estates are leased. Much of the learning respecting English leases results from English statutes never adopted in this State: as the English statutes which respect tenants in tail; the estates of married women; the estates of various corporations, of spiritual and other persons. Our practice in not distraining for rent reserved in leases, makes a material difference. Leases, as they respect *assumpsit* for rent, have already been considered, and will be further considered in future chapters, in covenant for rent and repairs, and in debt for rent. The words are "demise, grant, and to farm let," usually.

§ 3. *When a lease ends &c.* If A lease to B for seven years, and B is to repair and pay rent, and has liberty at the end of three years to put an end to the lease, giving six months' notice, an end is not put to the lease by giving the notice, but B must repair and pay rent, and do all on his part to be done to put an end to the lease. See also 2 Maule & S. 541.

6 D. & E. 666,  
Porter v.  
Shephard.—  
4 Cruise, 116.

§ 4. The statute of 32 H. VIII. c. 34, as to assigning leases and reversions, has ever been adopted in this State from the first settlement of it. This important act recites, that divers persons had made sundry leases and grants to divers other persons of sundry farms, lands, tenements, or other hereditaments &c., for term of life or lives, or for term of years, by writing under their seal or seals, containing certain conditions, covenants, and agreements, to be performed as well on the part and behalf of the said lessees and grantees, their executors and assigns, as on behalf of the said lessors and grantors, their heirs and successors; and for as much as by the com-

32 H. VIII.  
34.

CH. 110. mon law no stranger to any covenant, action, or condition,

*Art. 3.* shall take any advantage or benefit of the same, by any means or ways in the law, but only such as be parties or privies thereunto, by reason whereof all grantees of reversions be excluded to have any entry or action against the said lessees and grantees, their executors or assigns, which the lessors before that time might by law have had against the said lessees, for the breach of any condition, covenant, or agreement, comprised in the indentures of their said leases, demises, and grants: and enacts, "That all and every person and persons, and bodies politic, their heirs, successors, and assigns of every of them, shall and may have and enjoy like advantages against the lessees, their executors, administrators and assigns, by entry for the non-payment of the rent, or for doing of waste, or other forfeiture; and also shall and may have and enjoy all and every such like, and the same advantage, benefit, and remedies by action only, for not performing of other conditions, covenants, and agreements, contained and expressed in the indentures of their said leases, demises, or grants, against all and every of said lessees, and farmers, and grantees, their executors, administrators, and assigns, as the said lessors or grantors themselves, or their heirs or successors, ought, should, or might have had and enjoyed at any time or times:"

"That all farmers, lessees, and grantees of lands, tenements, rents, portions, or other hereditaments, for term of years, life or lives, their executors, administrators, and assigns, shall and may have like action, advantage, and remedy, against all and every person and persons, and bodies politic, their heirs, successors, and assigns, which have or shall have any gift or grant of the king, or of any other person or persons, of the reversion of the same lands, tenements, or other hereditaments, so letten, or any parcel thereof, for any condition, covenant, or agreement, contained or expressed in the indentures of their lease or leases, as the same lessees, or any of them, might and should have had against the said lessors or grantors, their heirs or successors; all benefits and advantages of recoveries in value by reason of any warranty in deed or law, by voucher or otherwise, only excepted."

§ 5. This act seems to make all the contracts in a lease assignable with the estate, so that every person or corporation, his heirs, its successors, and their assigns, grantees of the reversion, may have like advantages against the lessee, his executors, administrators, or assigns, by entry for not paying rent, or for waste, or other forfeiture, and by action for not performing other conditions, or covenants in the lease, as the lessor or his heirs may have; and so that every lessee, his ex-

ecutors, administrators, and assigns, for life or years, have like action and remedy against every person and corporation, their heirs, successors, and assigns, having any reversion of an estate leased, assigned to him, &c. for any condition or covenant in the lease broken, as such lessee &c. may have against the lessor, his heirs, &c. ; benefits of recoveries in value on warranties, in deed or law, by voucher or otherwise, only excepted. As to many matters in explanation of this act, and in regard to assignees, Ch. 105 ; and Ch. 106, the rights and obligations of assignees.

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§ 6. Leases may be for life of the lessor or lessee, or of a third person, or for years, or at will ; and may be created by deed or grant. And estates for life may be not only by express words, but by general grant, without defining or limiting any specific estate. As if I grant to A a certain farm, this makes him tenant for life ; for as there are no words, as *heirs &c.*, creating a fee, yet A shall have as large an estate as the words of the lease or grant will bear, that is, for his life, or if an estate tail, for my life. And an estate for the lessee's life is larger than for the life of another ; and as all leases and grants are construed most strongly against the lessor or grantor, for reasons before stated, an estate leased generally, to one, or to one for life, the construction shall be that it is for his life, unless there be some special reason to the contrary, as where the lessor has only an estate tail &c. There are some life estates that may not always continue during life, but may determine on some future contingency ; as if an estate be granted to a woman during her widowhood, it is a life estate, but may determine on her marriage ; while it continues, it is viewed as an estate for life, because by possibility it may last for life. A tenant or lessee for life has the emblements in certain cases. See Emblements, above.

2 Bl. Com. 120, 121, 122.  
—Noy, Max. 86, 90.—1 Mod. 190.—1 Stra. 665.—1 Cruise. 243, 245 ; for years is not perfected without entry by the lessee, 247 ; except under the statute of uses, 248 ; may commence in future, id. ; & assigned before entry, 249 ; & goes to exrs., 252.  
2 Bl. Com. 143.

Every estate that expires at a certain period is an estate for years, by whatever words created ; but "*id certum est, quod certum reddi potest.*" Hence a lease for as many years as A shall name, is a good lease for years. An estate at will is where lands are let by one to another, to have and to hold at the will of the lessor, and the lessee gets possession ; he has no certain indefeasible estate he can assign, as the lessor may put an end to it when he pleases ; but every estate at will is at the will of both parties, and either may determine it when he pleases ; but however lessee at will has the emblements as stated above, Ch. 76.

§ 7. *American cases &c.* In this action the court decided, that a lease of a minor's land by his father, as his natural guardian, is void ; especially considering the provisions of our

2 Mass. R. 55, May v. Calder.

CH. 110. statutes respecting guardians, which require them to give bonds &c.  
Art. 3.

3 Mass. R. 138, Newhall & al. admrs. v. Wright.  
§ 8. See the case of a lease to A for years, and then the lessor mortgages to A the same estate, head of mortgages. In this case the court decided, that if A mortgage land to B, as security for a bond debt to be paid in five years, and at the same time make a lease to B of the same land for five years, and B therein covenants to pay rent, the rent is neither merged in, nor suspended by, the mortgage, but that A may recover the rent secured by the lease; but otherwise if the mortgage had been made after the lease. One cannot have a leasehold estate in land in which he has a freehold estate; former merges, or rather never exists, under the same will.

15 Mass. R. 444.

6 Mass. R. 246, Ellis & al. v. Welsh.

§ 9. This was an action of covenant broken, upon an indentured lease, by which the deft. leased to the plts. a brick store in Boston, and covenanted they should hold and occupy it for the term of five years, to commence on a certain day, &c. The court held, that this covenant, that the lessees should hold and occupy the demised premises during the term, amounted to a general covenant for quiet enjoyment during the term; also that the location of a town-way over land so leased, is no breach of the covenant, the lessee having by statute, as owner, a remedy against the town, equally with the lessor. And the covenant extended only to rights existing when it was made, and not to any after incumbrances. A leases a stream to B, reserving a part;—construction, see Ch. 71, a. 3, s. 8.

6 Johns. R. 74, Thornton v. Payne.

§ 10. *A lease and not a covenant.* A bargained, covenanted, and agreed with B, by articles, that he would lease to B a certain farm for six years, from April 1, 1807, on condition B should pay \$250 April 1, each year during the term. B covenanted to pay accordingly. Before April 1, 1807, A sold the farm to C. B sued A, as on covenant, and breach assigned in not giving possession. Held, the payment of the \$250 by B was not a condition precedent: 2. That this was A's lease and not his covenant, and the term commenced April 2, 1807: 3. The plt. must sue as lessee to get possession by ejectment.

7 Johns. R. 211.

§ 11. The assignment of a lease in writing, though not under seal, is valid.

1 Johns. R. 151, Bradish v. Schenck.

§ 12. A lease of land on shares for a single crop, does not lease the land itself, and only the owner of the land can maintain an action of trespass.

8 Johns. R. 394, 406, Jackson v. Gardner.

§ 13. A having a lease of land, voluntarily delivered it up, and destroyed it and took a new one; afterwards he claimed under the first lease. Held, if it was not duly surrendered in writing, according to the statute of frauds, yet A could recover

no more land than he could prove with absolute certainty it contained, especially as the premises claimed had been in another's possession sixteen years nearly. Every exception and uncertainty in a deed is to be taken favourably to the grantee. CH. 110.  
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§ 14. Lease for life, and a covenant the lessee should not sell or assign without the lessor's leave. Lessee sold and assigned a part with his leave; this was no surrender, but the lessee remained liable for every act of his assignee, amounting to a breach of covenant contained in the lease: 2. If the lessee or his assigns cut down wood on the leased lands, so as materially to injure the inheritance, it is waste and a breach of the covenant against waste: 3. If wild land wholly covered with timber is leased, the lessee may fell part in order to fit the land for cultivation and not be guilty of waste, but he cannot cut down all so as permanently to injure the inheritance: 4. But what part so as not to be guilty of waste a jury must decide under the court's direction. 7 Johns. R.  
227, 237,  
Jackson v.  
Brownson.  
  
See Waste.

§ 15. A lease for years, and the parties covenanted, that at the end of the term the buildings and improvements should be valued by three or five indifferent persons, to be chosen by them, and the amount paid by the lessor. After the term ended and premises surrendered up, the lessor refused to join in the choice &c.; then the lessee got them appraised by three indifferent men at \$750, and sued the lessor on his covenant, and the jury found the same sum \$750, but held, no interest could be allowed, as the *ex parte* appraisement was not conclusive, and the damages remained unliquidated till found by the verdict, and no interest can be allowed on unliquidated damages. 7 Johns. R.  
211, 213,  
Holliday v.  
Marshall.

§ 16. A tenant at will is considered as holding from year to year only for the purpose of notice to quit; but he has no right to such notice after he has determined his will by an act of voluntary waste, as cutting of trees, and action of trespass lies. After a sheriff's sale on a *fi. fa.* the deft. becomes *quasi* a tenant at will to the purchaser. 7 Johns. R.  
1, 6, Phillips  
v. Covert.—  
1 Johns. R.  
153.

§ 17. A lease of a house under seal is determined by the delivery of the key, the receipt of it by the lessor, and his putting another tenant into the house: 2. Lessee endorsed a negotiable note to the lessor to secure the rent, and he in his own name sued the maker, and levied his execution on his land. Held, the lessee was entitled to recover in an action for money had and received, the balance of the note after deducting the rent in arrear, the lease being previously determined, the satisfaction of the execution must be viewed as payment of the note or debt in money. The land was taken at money's worth. 1 Mass. R.  
494, Randall  
v. Rich.

CH. 110. Another case of a lease, see *Adams v. Bean*, Ch. 50, a.  
 Art. 3. 19. An averment of a lease for three years is not proved by  
 one for one year certain, and two years further possession on  
 the same terms by consent of the landlord. 4 Cranch, 299,  
 304, *Alexander v. Harris*.

1 L. Raym.  
 736, *Rawlins*  
*v. Turner*.

§ 18. *English cases*. For several leases for one year &c.  
 and so from year to year, and half a year's notice to quit &c.  
 see Ch. 178, a. 33.

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 16.—*Noy's*  
*Max.* 87.

Any *parol* lease which imports to convey an interest for  
 more than three years from the time of making it, is void ;  
 this by the statute of frauds. But see *Clayton v. Blakey*,  
 where it is said such a lease now enures as a tenancy from  
 year to year, having the effect of a lease at will on the ancient  
 principle, now by modern construction a lease for a year, and  
 so from year to year as long as both parties consent. This con-  
 struction seems directly to violate the statute of frauds, which  
 enacts, that all leases by *parol* for more than three years shall  
 have the effect of estates at will only. Where a lessee can  
 assign or not, a. 9, s. 7.

*Stomfil v.*  
*Hicks*, 2  
*Salk.* 413.—  
 1 Ld. Raym.  
 280.

§ 19. *Leases at will have been variously construed*. An-  
 ciently a lease at will was literally construed to be at the will  
 of either party ; but if the rent was payable periodically, as  
 yearly, half yearly, or quarterly, and the lessee determined his  
 will during the period he was held to pay the rent of the whole  
 period ; on the other hand, if the lessor so determined, he lost  
 the rent of the whole period, and the lessee had the emble-  
 ments ; so that it behoved each party to determine his will at  
 the end of such period. In *Stomfil v. Hicks*, it was held, if  
 the lessor determined his will in the middle of a quarter &c.,  
 he allowed the tenant the emblements, and of course lost his  
 rent of such quarter &c. ; also in this case held, a lease for a  
 year and so from year to year was a lease for two years,  
 and afterwards at will ; also, if a termor for years granted  
 for a less term to commence after his death, it was good.

*Leighton v.*  
*Theed*, 1 Ld.  
*Raym.* 707.

2 Salk. 413.—  
 3 Salk. 222.

In this case the court held : 1. That either party might de-  
 termine a lease at will when he pleased : 2. But if determined  
 on any other than a rent day, he who determined it lost the  
 accruing rent : 3. Also held, in the same case, if a lease be  
 from year to year, so long as both parties shall please, it could  
 not be determined, except at the end of the year. This is the  
 law, except as to the first point in this case ; and see Ch. 178,  
 a. 33, where it is shewn there are in England now no leases  
 at will.

2 D. & E. 739,  
*Doe v. Clare*.  
 —10 Johns.  
 B. 336.

§ 20. *What is a present lease or not*. See *Baxter v. Brown*,  
*Goodtitle v. Way*, not a lease but an agreement for one ;  
 where an instrument reciting that A, if he should be entitled  
 to certain premises on B's death, would immediately lease

them to C, declaring he did thereby agree to demise the same, with a subsequent covenant to procure a license &c. to do it; held, only a contract for a lease. See also *Roe v. Ashburner*.

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An instrument contained these words, "be it remembered, that J. B. hath let, and by these presents doth demise;" held, a present lease, though the instrument contained a further covenant for a future lease. But the following is only an agreement for a lease. A agreed to let her house to B during her life, supposing it to be occupied by B, a tenant agreeable to A, and a clause was to be added in the lease, to give A's son an option to possess the house when of age; this clause shewing it to be executory.

6 D. & E. 166  
&c., *Barry v. Nugent*.—  
6 East, 530,  
*Doe v. Smith*.

§ 21. *Leases for one or more years how construed.* A lease for one year, so for two or three years, as the parties shall agree, from the first year, is a lease for two years; and after every subsequent year began is not determinable till that be ended. See *Ferguson & ux. v. Cornish*, *Goodright v. Richardson*, Ch. 55, a. 4. If a lease be made for seven, fourteen, or twenty-one years, the lessee only has the election, at which of such periods to determine it; fully recognised *Doe v. Dixon*, 9 East, 15. In *Dann*, assignee of the lessee, *v. Spurrier*, the lease was dated Oct. 14, 1791, and June 20, 1798, the lessor, *Spurrier*, gave notice to quit at Christmas next, and brought ejectment, and the plt., *Dann*, filed a bill in chancery &c., from whence rent &c. These words in themselves are indifferent as to lessor or lessee, but the lessee is viewed as the grantee, and then entitled to the rule of law, taking words most strongly against the grantor who uses them. And the court held also, the general rule was to construe leases favourably to the lessee. 3 D. & E. 462, *Goodright v. Hall*; *Salk.* 413; *Lutw.* 213, and *Legg v. Stradwick*, Ch. 151; 1 D. & E. 380, *Birch v. Wright*; see *Denn v. Cartright*; 9 East, 15.

1 Wils. 262,  
*Harris v. Evans*.—  
3 Bos. & P.  
399, *Dann v. Spurrier*.—  
Ambl. 329.  
9 East, 15,  
*Doe v. Dixon*  
on & al.

§ 22. *Provisoes in leases how construed—three executors, all must join in an election.* A lease for twenty-one years contained a proviso, that if lessor or lessee, or their respective heirs or executors wished to determine it at the end of seven or fourteen years, and give six months' notice in writing, under his or their respective hands, the term should cease. The lessor died, leaving three executors, to whom he devised the freehold as joint tenants; two of them gave the notice to quit, signed by those two, expressing it was given on behalf of themselves and the third executor. Held, this was not good under the proviso, as that required it to be given under the hands of the three executors: 2. Nor was such notice good under the general rule of law, that one joint executor may bind the others by an act done for his or their benefit; as *non constat*

5 East, 491,  
*Right v. Cutbell*.  
Lease for  
years may  
end by provi-  
so. 4 Cruise,  
506. No free-  
hold can be  
derived out  
of it, 1  
Cruise, 254;  
or greater es-  
tate, 259.—  
How subject  
to merger,  
see *Merger*.

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to end the lease thus is for such benefit : 3. As the lessee was to act on the notice at the time, no after recognition of the third executor could make it good by relation : 4. Nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. At the time of the notice the lessee could not be assured the third executor would not disavow the notice, and claim him still as tenant to him ; " the two joint tenants had no right to bind the third in his absence, unless the act done appeared for the benefit of all," and it was incumbent on the two to shew it was so. See *Roe v. Harrison*.

2 D. & E. 133,  
*Roe v. Galliers*.—  
1 Dougl. 184.

A proviso in a lease for twenty-one years, that on the lessee's committing an act of bankruptcy, on which a commission shall issue, the lessor may re-enter, is a good and valid proviso. Same on committing such act and being found a bankrupt, good. See also *Johns v. Whitley & al.* ; also *Cudlip v. Rundall*.

Dougl. 56,  
*Kinnerly v. Orpe*.

If there be a proviso in a lease the lessee shall not assign, under leases are not within the proviso ; and it is an under lease and not an assignment, where the second lease is for a shorter time than what remains of the first lease ; but an assignment, if a day only be reserved &c. See *Roe v. Harrison*.

8 D. & E. 57,  
300, *Doe v. Carter*.—  
2 East, 481,  
*Doe v. Hawke*.—  
8 East, 185,  
*Doe v. Clarke*.—12  
Ves. jr. 504.—  
3 Wils. 234,  
*Crusoe v. Bugby*.—  
2 D. & E. 425.  
2 Cruise, 17.

Lessee covenanted not to assign, let, transfer, barter, or exchange, or otherwise part with the indenture, proviso the lessor might re-enter in such case. Warrant of attorney given by the lessee to confess judgment, on which the lease was sold on execution was no forfeiture of the lease on the provision. But where the lessee in such case gave such warrant to a creditor for the express purpose to enable him to take the lease in execution on a judgment ; held, a fraud on the covenant, and the lessor on such proviso &c. recovered the leased premises in ejectment from a purchaser under the sheriff's sale. In the first case the lease or term was taken in *invitum*, the lessee, as every judgment and execution is ; but in the last case he voluntarily caused it to be sold and transferred. See *Palmer v. Edwards*.

7 Johns. R.  
538.

§ 23. *Remainder-man accepts rent, how affected &c.* See *Doe v. Butcher*, *Jenkins v. Church*, 3 Atk. 692 ; *Willes*, 169 ; 7 D. & E. 83, 478.

1 Burr. 282,  
*Wright v. Cartwright*.

Lease for years if lessee live so long, remainder to A for the residue of the term ; held, A, the remainder-man, should enjoy during all the residue of the years to come.

1 Bos. & P.  
531, *Doe v. Archer*.

*Lease of tenant for life void as to remainder-man, even though noticed by him as existing &c.* As where tenant for life leased the premises for twenty-one years, and, before the term ended, died, the trustee of the remainder-man, then a minor, continued to receive the rent reserved, and he when of age, sold the premises by auction, and in the conditions of sale they

were stated to be subject to the lease, and in the conveyance to the purchaser the lease was referred to as in the lessee's possession, and in the covenant against incumbrances, that lease was excepted; the purchaser mortgaged, and in the mortgage like notice of the lease, and the mortgagees fore some time received the rent reserved; yet held, the lease expired with the interest of the tenant for life, and that the notice afterwards taken of the lease did not operate as a new lease. Though one not a party to a deed may take in remainder, yet he cannot take a present interest, nor be a party to a covenant in the deed.

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§ 24. *Merely cancelling a lease is not a surrender of the term within the statute of frauds*, which requires such surrender to be by deed or note in writing, or by act or operation of law: 2. Nor is a recital in a second lease, that it is granted in part consideration of the surrender of the prior lease, a surrender by deed or note in writing of such prior lease, not purporting in terms to be a yielding up of the interest: but 3. In some cases the acceptance of a second lease for part of the same term before leased, may be a surrender of such prior term by operation of law, and though the second lease be voidable, if not merely void; but such first and cancelled lease may be set up by the lessee &c. See *Wilson v. Sewell*, *Davidson v. Stanley*, &c.

6 East, 86,  
109, *Roe v.*  
*York*, nume-  
ous cases  
cited.

§ 25. A lease for a year, and so from year to year, during the life of J. S., being but for two years it may be by word or writing. And if I lease to J. N. to hold until £100 be paid, and make no livery of seizin, he hath but an estate at will. No consideration is necessary in the assignment of a lease for years.

*Noy's Max.*  
86, 90.—14  
H. VIII. 16.

§ 26. When a lease includes or excludes the day of the date; see *Pugh & ux. v. Duke of Leeds*, Ch, 27, a. 5, s. 2, and *Noy's Max.* 87. If lands descend to an heir, he may lease them before he enters.

4 Cruise, 161.

§ 27. If a man let a house with the appurtenances, no land passes; but if with all lands to the same belonging, then the lands pass used with it.

*Flow.* 170.—  
*Cro. J.* 526.

§ 28. The land is the place where the rent is to be demanded and paid, if no other place be appointed by the parties. A leases lands to B without impeachment of waste, a stranger cuts down trees, and B brings trespass; he recovers not for the value of the trees, but only for the crop and breaking the close; and the lessor's heir has the trees, and not the lessee's executor, unless they be cut by the lessee and enjoyed by the grantee without waste. Lessee for life or years has only a special property in the trees, mainly for necessary wood for firing, implements of husbandry, and repairs; but if the

*Noy's Max.*  
87, 88.—Co.  
Lit. 41.

CH. 110. lessee or other person sever them from the lands, this special  
 Art. 4. property of the lessee ceases, and the lessor may take them  
 as things parcel of the inheritance.

Noy's Max.  
88.

§ 29. To accept the rent of a void lease will not make it good, but if only avoidable at will.

Noy's Max.  
88.

§ 30. If *baron* and *feme* buy lands to them and the heirs of the husband, and he leases them and dies, she may enter and avoid the lease for her life, but if she dies, leaving the husband alive, and then he dies before the term is ended, the lease is good to the lessee against the heir.

Noy's Max.  
88, 89.

§ 31. If A make a lease for ten years and then another for twenty-one years, the last is good for eleven years after the first is expired. If the lessee at his expense put glass into the windows &c., it is waste for him to take it away. So of wainscot and ceiling, if not fixed with screws. See Waste, Ch. 78.

Noy's Max.  
89.—Hob. 5.  
—Cro. Jam.  
332.

§ 32. A lease made by the husband alone of his wife's lands, is void after his death, but the lessee has his emblements;—rather voidable by her entry. If made by both is voidable, if not made on the 32 H. VIII. 28.

Noy's Max.  
89, 90.

§ 33. If a man lease lands for life or years, reserving rent, and enters on any part thereof and takes the profits, the whole rent is extinguished, "and shall be suspended during his holding thereof." Several equitable provisions in the civil code of Louisiana, pp. 372 to 382.

#### ART. 4. *Lease and release.*

Lease & release was a mode of conveyance at common law, Cruise on Uses, 98, was probably adopted in all the Colonies.—2Vent. 35.—Co. Lit. Abr. 362.—2 Bl. Com. 339.—5 Wood's Con 248, 249.—Co. Lit. 270.

§ 1. There can be no doubt but that land in this State, may be conveyed by *lease and release*, especially if the lessee enter under his lease, which gives him a right of entry, because then being in actual possession under it, and having an interest, he is capable of a release of the reversion; and the only question is, how far the lessee may take a release before entry. It is clear he may receive a conveyance of the fee by release in either of two ways: 1. By raising a use by the lease: 2. By the release's operating as a deed of conveyance. It is laid down in the English books, that "before the statute of uses, the lessee before entry by himself, or by his privy in estate, could not take a release, but that since that statute was passed a release to a bargainee for a year &c. is good, because a use is raised in the lessee, and then the statute executes the possession to the use; and if on a lease for years there be a reservation only of a peppercorn, it is a sufficient consideration to raise a use, and therefore to make the lessee capable of a release;" and no actual entry is necessary by the lessee; the lease, consideration, and statute, give possession.

§ 2. "A lease, or rather bargain and sale, upon some pecuniary consideration, for a year, is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seized to the use of the bargainee, and vests in him the use of a term for a year, and then the statute immediately annexes the possession; he therefore being thus in possession, is capable of receiving a release of the freehold and reversion, which must be made to the tenant in possession, and accordingly the next day a release is made to him." This is viewed as supplying the place of livery of seizin, and so a lease and release is viewed as amounting to a feoffment. Hence to take a release, as such, the lessee must be in possession, by entry, or by way of use, and to that a possession is annexed by the statute of uses. "The lease and release are but one conveyance, and in the nature of one deed." In the lease it is usual and best to mention a consideration of money, as 5s., or some other small sum, though it be never paid.

A question has been made if a peppercorn rent reserved be sufficient, though after some doubts, it was held to be sufficient, connected with the word *grant* in the lease, to raise a use. Doubted as to other cases, Cruise on Uses, 103.

§ 3. At common law, when an inheritance was to be granted, a lease for years was made, and the lessee entered, and then the lessor released to him, and this passed the estate. The person who makes the lease or bargain and sale for a year, must be in actual possession at the time, and if he has not the possession before the sale he must enter upon the land, and there seal and deliver the deed to the bargainee, and this puts the bargainee into possession; and if the lease be before sealed, it must be first delivered on the land; for if the lessor deliver it before entry, when as against a disseizor in possession he has but a right, the delivery and the deed are void, and a second delivery on the land is also void; and if the first delivery be as of an *escrow* it makes no difference. Lessor must have a right of entry.

§ 4. If a lease for years be made without any consideration of money, the lessee has not any estate till entry; for before entry he has but an *interesse termini*, and no possession, neither has the lessor any reversion, till the lessee enters, nor will a release to him, that enures by way of enlarging an estate, operate without a possession.

§ 5. If leases for another's life be made to A in tail, he may, by lease and release, bar his own issue, and make a complete disposition of the whole estate.

§ 6. To make a release good of land or tenements, the

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2 Bl. Com. 339.—Co. Lit. 270.—5 Wood's Con. 248.—Cruise on Uses, 98, 99; needless to make livery &c. to a lessee in possession.—Lit. sect. 459.—4 Reeves, 355.

2 Mod. 252, in Barber v. Keat.—Cruise on Uses, 102.

5 Wood's Con. 249.—Cro. El. 446, 447, 483, Jennings v. Bragg.—4 Cruise, 144, 152.—Cro. J. 604.

Co. Lit. 270, 278.—5 Wood's Con. 249.—Cro. Jam. 169.

2 Fearn, 17.

Co. Lit. 271.—5 Wood's Con. 250, 251.—Lit. sect. 461, 462.—6 Wood's Con. 141.—Plow. 641.—Cruise on Uses, 102.

CH. 110. releasor must have an estate in himself, out of which the estate may be derived to the releasee : 2. He must have an estate in possession, in deed or in law : 3. There must be a privity of estate between the releasor and releasee : 4. There must be sufficient words in law not only to make the release, but also to create and raise a new estate. Hence if one " occupy as tenant at sufferance, a release will not enure to him, for want of privity." Otherwise as to a tenant at will ; for there is a privity. And if tenant for life leases to B for years, and he in reversion, and tenant for life jointly release to B, this is good to enlarge his estate.

6 Wood's  
Con. 141.

Dyer, 251.

§ 7. Second. In our law a release in form often operates as a deed of conveyance. As if lessee for life or years release to him in remainder or reversion, this is not good as a release ; but may amount to a surrender, according to the intention.

Cowp. 599,  
601, Goodtitle  
v. Bailey.  
—Shep.  
Touch. 82.—  
2 Wils. 76.—  
Co. Lit. 301.

§ 8. Though a deed be in the form of a release, if there be a sufficient consideration and words, it may operate as a *grant* in order to make it good ; and " a deed made to one purpose may enure to another ; if meant for a release, it may amount to a grant of the reversion, or *e converso*." " So a deed intended for a release was held to operate as a covenant to stand seized." Some have required the word *grant*, being *genus generalissimum*, to be used in a release, to make it in any case operate as a grant ; but this has been overruled.

Cowp. 600.  
1 H. Bl. 25,  
Doe v. Williams.

§ 9. Conveyance by lease and release ; and the release contains the words, " all lands &c., belonging and used, occupied and enjoyed, or deemed, taken, or accepted as part thereof &c.," will pass leasehold lands, held for a long term of years, and occupied for many years as part of the estate, as well as freehold ; especially against the releasor.

New R. 118,  
114, Butcher  
v. Butcher.

§ 10. *No extrinsic evidence to explain a release.* As where A, B's mother, gave a bond on his behalf for £1000. B executed to her an indemnity bond of the same date, April 26, 1800, penalty £2000, conditioned to pay £1000 three months after her death. After this she made a codicil to her will, and by it released two debts due to her from B, and desired him to be punctual in indemnifying her estate against said £1000 bond. Three days after making this codicil, she executed a release to B, in which, after specifically mentioning three debts due to her from B, on certain securities, expressed she had agreed to release B from those sums, " and of and from all or any other sum or sums of money, claims, and demands, thereby secured, or intended to be secured, and all other sum or sums of money, claims, and demands, whatsoever ;" and released him accordingly, and all matters whatever. Held as above. Also held, this release did not extend

to the indemnity bond, though the release in words included all demands and matters whatsoever.

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ART. 5. *Releases.*

§ 1. Conveyances by releases are also adopted in this State, but in respect to all hereditaments must be by our statutes, by deed signed, acknowledged, and recorded, to be valid to all purposes, and the releasee must be so in possession as to be able to take a release. And he must have a freehold or a possession and privity, Noy's Max. 94, but may be by way of use.

§ 2. A release is the conveyance of a man's right in lands and tenements to another, who has some former estate in possession, in deed, or in law. The words generally used are, "remised, released, and forever quit-claimed." Releases may be in deed, or expressed, or in law, or implied. In law, as where the disseizee disseizes the heir of the disseizor, and makes a feoffment in fee; this, in law, is a release of the disseizee's right and action, and "if a disseizee release to the disseizor's lessee for life, his right is gone forever." As this lessee for life has a freehold, he may take a release of a freehold or inheritance.

2 Bl. Com. 334.—Lit. sect. 445.—6 Wood's Con. 134 to 198.—6 Com. D. 179, 190.—Co. Lit. 264.—Noy's Max. 94.—4 Cruise, 145.

§ 3. A release may operate four ways: 1. To enlarge the releasee's estate: 2. To pass an estate: 3. To pass the right: 4. To extinguish the right.

2 Bl. Com. 334.—Co. Lit. 273, 279.

§ 4. As to the first, the parties to the release must be privies in estate; therefore if a lessee underlease to A, a release from the first lessor to A is void, for there is no privity between them; but a lessor for life or years may release to the husband of the lessee, his heirs, &c. "Where a release enlarges an estate, the releasee must be not only privy, but also have an estate;" for where he has no estate, it cannot be enlarged; but when he has even a leasehold estate, it may be turned into a fee. As where I am seized in fee, and lease to A for years, remainder to B for life, and I release to A and his heirs, his estate is thereby enlarged into a fee on the privity between me and him; which also exists between me and my tenant at will; but not at sufferance. A lessee for years must enter in order to take a release to enlarge his estate; yet before the lessee for years enters, the lessor's release to him will extinguish the rent, if the lease begin presently reserving rent. Co. L. 270.

4 Cruise, 145, 147.—Lit. s. 451.—Co. L. 272, 273.

A release from trustees to *cestui que use* is good on the privity between them, Co. L. 271.—Lit. s. 460.—Co. L. 270.—4 Cruise, 148, 150.

§ 5. As to the second kind of release to pass the estate; this also must be among privies, that is, parceners or joint-tenants, and such releases want no words of inheritance. See 4 Cruise, 145, 146.

Lit. s. 304.—Co. L. 273.—Gilb. Tenures, 72; see Joint-tenants, &c. Lit. s. 466, 467.—Gilb. Tenures, 55.—4 Cruise, 146, 147.

§ 6. As to the third kind of release to pass the right, as a

Tenures, 55.—4 Cruise, 146, 147.

CH. 110. release of a disseizee to a disseizor, and such a release may be on condition. A bare right, released for an hour, is gone forever. A disseizee cannot release a part of his right. This

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release of the right enures not by way of privity, for there is none, for instance, between the disseizee and disseizor, but by way of entry and feoffment. As if A be ousted by two disseizors, abators, or intruders, and A releases to one of them, the releasee shall hold the other out in such manner as if A, the disseizee, had entered and put an end to the tortious estate, and enfeoffed him. But if a mortgagee be disturbed by two, and the mortgagor release to one of them, this enures to both. In this case the mortgagor merely extinguishes the title of re-entry he had by force of the condition; and "a release by him whose entry is not lawful enures by way of extinguishment." "If disseizee, or he whose remainder or reversion is divested by a forfeiture, release to the tenant of the land, whether in by feoffment or disseizin, such release, if the releasor have right of entry, defeats all mean titles;" for it enures by way of entry and feoffment. But if a disseizor in-feoff two, a release to one enures to both, for they being in by feoffment, the disseizee's right of entry is gone, and then his release to one cannot operate by way of entry and feoffment, but as an extinguishment of his right.

Lit. sect. 472.  
—Co. Lit.  
276.—4 Cruise,  
145, 146.

Lit. s. 479,  
480.—Co. L.  
280.—2 Bl.  
Com. 325.—4  
Cruise, 150.

§ 7. As to the fourth, *releases that extinguish the right*; this, as to the releasor, may sometimes enure by extinguishment, as to others, to pass a right. Generally if one has only a right or future interest, he may convey it, by a mere release to the tertenant, as his occupancy is sufficiently notorious.

6 Wood's  
Con. 152,  
case of Walk-  
er.—2 Bl.  
Com. 326.—  
4 Cruise, 250,  
251.

§ 8. A release is a proper mode of conveyance among all privies in estate; that is, "when one estate is so related to the other as to make but one and the same estate;" and when several are privies in estate, a release to one is a release to all. Privies may be those who own like estates, as parceners; or lesser and larger estates. And if there be privity of estate, and one party be in possession, livery of seizin is nugatory.

Co. Lit. 193,  
278, 277.—6  
Wood's Con.  
136, 144.—  
Lit. sect. 446.  
4 Cruise, 250,  
251.

§ 9. Many rights may be extinguished by a release that cannot be granted or assigned; but a right that shall hereafter come to one he cannot release; hence the words, *whatever he may have in futuro*, are void; otherwise if the release be with warranty; then it bars him of all that comes to him afterwards, or after the warranty is made. Even the release of the heir, in his ancestor's life time, with warranty, will bar him after his death; but otherwise if without warranty. It is a bar, to prevent circuitry of action, which is not favoured in law, "as he that makes the warranty would recover the land

6 Wood's  
Con. 144.—  
Lit. sect. 446.

against the tertenant, and he, by force of the warranty, **CH. 110.**  
would be entitled to have as much in value against the other **Art. 5.**  
persons."

§ 10. All rights of action and entry may, by release to the **Lit. s. 446.—**  
tertenant, be extinguished, as by release to the tenant to the **10 Co. 48,**  
freehold in deed or in law, or to him in remainder or rever- **Lampet's**  
sion, without any privity at all. So by the demandant to the **case.—Co. L.**  
vouchee, or donor to the donee, after he has discontinued, in **266, 269; cit-**  
respect of privity, and without any estate or right. **ed 4 Cruise,**  
**151.**

§ 11. So conditions annexed to estates, powers of revoca- **Bro. Releases.**  
tion of uses, warranties, covenants, rents, commons, and other  
profits, to be taken out of lands may be extinguished, dis-  
charged, or determined, by a release to the tenant of the land.

§ 12. So *possibilities* may be released to him who has the **10 Co. 47, 51,**  
land. Hence if A have a term for 1000 years, and devise it **52, Lampet's**  
to B for life, remainder to C and his heirs, during the term, **case.—1 Co.**  
C may release his interest to B, though he cannot grant it **110, 114, Al-**  
over; and the term itself, and not the use, being devised to **bany's case.**  
B, made no difference. This case was resembled to dower,  
which the wife may release, living her husband; though she  
may die before him, and never have it. But to make a re-  
lease good, the releasor must have at the time a right, "or a  
foundation, or original inception of a right," and its consum-  
mation within a common intendment, as one's death &c., and  
the possibility ought to be necessary and common. But ac-  
cording to Noe's case, the creditor has not this inception of **Noe's case.**  
right against the bail before judgment against the debtor; so  
when there is uncertainty as to the person. And in this case  
of Lampet, the release of C gave B the whole term of 1000  
years.

It is said if an annuity be granted to one for life, if he do **6 Wood's**  
such a thing, he may release before the condition is perform- **Con. 138; but**  
ed. But it is said also, if A promise me to pay me \$50 if he **1 Co. 111.—6**  
shall sell his land for so much, this \$50 is not releasable be- **Com. D. 182.**  
fore the land is sold, as it is a mere possibility depending on a  
future contingency.

§ 13. *A bare power cannot be released.* As if A devise **6 Wood's**  
his executors shall sell his lands, and after his death they re- **Con. 146, 147,**  
lease to his heir all their right and title in the lands, this is **148.—6 Com.**  
void. So if the executor disseize the heir, and alien the land. **D. 182.—Co.**  
**Lit. 265.—1**

§ 14. A freehold or inheritance is not releaseable to tenant **Co. 111.—10**  
for years without privity. Hence if tenant for life, or in fee, **Co. 48.**  
release to the lessee for years of his disseizor, this release is **9 H. VI. 43.**  
void; for there is no privity between the disseizee and the **—Perkins,**  
lessee of the disseizor; but a release of a term for years to **sect. 823.**  
such lessee would be good; but though such release of the  
freehold or inheritance is void, yet if the release contain a

**CH. 110.** covenant of warranty, it rebuts and bars the releasor and his heirs of a future right.

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§ 15. So a condition may be released. As if a feoffee on condition make a lease for life, and the feoffor release to the lessee, this discharges the condition. But if a disseizor make a feoffment on condition, and the disseizee release to the feoffee on condition, this does not discharge the condition, though the disseizee's right is barred by his release.

4 Bac. Abr.  
313.

A possibility is of no regard in law, till it happens so as to pass any interest.

1 Co. 112,  
113, Albany's  
case.

§ 16. A power coupled with an interest may be released, as in the usual cases of revoking uses. As when the feoffor &c. has power to alter, change, determine, or revoke them, being intended for his benefit, and he releases to any one who has a freehold in possession, remainder, or reversion, by a former limitation, this release is good, and extinguishes the power; makes the estate absolute before defeasible, and excludes the releasor from any power of alteration or revocation. But if the power be collateral, or to the use of a stranger, and no benefit to the releasor, it is otherwise. As if A make a feoffment to B to divers uses, provided that B shall revoke the uses, and he releases to any one of them that has a use, this does not extinguish the power.

5 Co. 27, 28.  
—6 Wood's  
Con. 150, 158.  
—Bro. 88,  
Release.

§ 17. *As to warranties.* A feoffee in fee may release a warranty annexed to his estate; but not a tenant in tail. So any covenant annexed to lands may be released by any, who have the whole estate in them. And by a release of all warranties or covenants real, all warranties then made and in being are discharged forever.

Lit. sect. 148.  
—10 Co. 51,  
62, Lampet's  
case.

§ 18. *A release may be personal.* As where I am disseized of land, and release to the disseizor all actions I have or may have against him, this is personal, and bars not my heir after my death of his remedy; nor does it bar me of my remedy against his heir after his death. So if I deliver goods to A, and then release to him all actions, I am not barred to sue his executors after his death; for the action as to the heir or executor is a new action, not in *esse* at the time of the release. But in such case my release ought to be clearly confined to my actions against A only, and so expressed.

Lit. sect. 452,  
453, 470.—  
Co. Lit. 267.

§ 19. *Among privies; the effect of a release.* A release to tenant for life enures to him in reversion or remainder also; so to one in reversion after an estate tail, to the tenant in tail.

Co. Lit. 276.

And in all cases where a release is to one who is not merely a wrongdoer, it enures to his companion also. As if two women disseize A, and one of them marries, and A releases to the husband, this enures to both women, for he is not a wrongdoer.

§ 20. *So of necessity.* As where two disseize a tenant for life, or in tail, and he releases to one of them, this enures to both ; for they have a fee by disseizin, and the release of one only tenant for life or in tail, cannot enure to the whole estate, nor can it enure as an entry and grant, for that shall vest the reversion ; hence it must enure to both. And if there be two disseizors, and they lease for life or years, and then the disseizee release to one of them, it enures to both, for one cannot have the sole possession.

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Co. Lit. 276.

§ 21. A release to one disseizor may be to the benefit of all. As where a disseizor is disseized by B, and the original disseizee releases to B, or to any subsequent disseizor ; this enures to the benefit of all prior disseizors, if at the time of the release the releasor's entry be not lawful ; because then it cannot operate by entry and grant to B, as the releasor's right of entry is gone. But when it can so operate, it generally passes the estate to the releasee. But wherever the releasor's right of entry is gone, his release enures only by way of extinguishment, and all former estates, though wrongful or defeasible, stand in force against the releasee ; yet if one having title against him before the release, after it is made, bring a writ of right, and the *mise* is joined on the mere right, the jury shall find for the releasee ; for he has the right, though the releasor could not enter when he released.

Co. Lit. 277,  
279.—6 Com.  
D. 183.—Lit.  
sect. 478.

§ 22. *The elementary principles of release in England and these States considered and briefly compared.*

Commentary.

All releases as to real estates operate, 1. By reason of privity : 2. As an entry into the land, and feoffment of it : 3. By way of extinguishment.

§ 23. Privity is wherever two or more persons have such interests as make one and the same estate, and not by tortious acts, as lessor and lessee, one in remainder or reversion, and tenant for life &c., and one releases to the other, the releasor's right and interest passes to the releasee, and his estate is enlarged by reason of the privity between them. The releasee must have some former estate in deed or in law ; a tenant by sufferance has not, but a tenant at will has, this estate. And a release grounded on privity to one is a release to all. So a release from one parcener or joint-tenant to another, passes the interest by reason of privity. 5 Cruise, 133.

§ 24. Second. When there is no privity between releasor and releasee, as between disseizee and disseizor, lessor and lessee's under-lessee, and the releasor has a right of entry, his release enures by way of entry and feoffment ; here it is only to the releasee's benefit.

§ 25. Third. But when there is no privity or right of entry in the releasor, his release can operate but by way of ex-

CH. 110. tinguishment, and then it merely extinguishes the releasor's  
 Art. 5. right and title ; and it operates to the benefit of all interested  
 in the land, and leaves even tortious estates as they were ;  
 except where the parties join in the *mise* in a writ of right.  
 In that case the release of him who had the mere right of property and no right of entry, shall prevail against him having the right of possession ; for here only the right of property is tried, and such releasee has it.

§ 26. The foregoing principles of releases are by the English common law, among which entry and feoffment on the land is material in that law, but not in ours ; this may make a material difference in some cases. The principles of privity and of extinguishment, and the right of entry are the same in both laws. So as to possibilities, naked authorities, power coupled with a benefit and warranties. So the English and our law are the same where the releasee is not strictly a wrongdoer, and where there is no privity between him and the releasor ; as in the case before stated, where two women disseized A, and one of them married, and A released to her husband, he not being a wrongdoer, as he came into possession merely by marrying a woman previously in possession, and not by any wrongful act, and it was decided that the release enured to the benefit of both women ; for the release operates by extinguishment, so leaves former estates as they were ; though some think this release of A's ought to be construed a grant of his estate to the husband ; because, say they, the deed is to him and expresses the consideration to come from him ; nor can livery of seizin by our law be contemplated as any part of the case, nor of course entry and feoffment. But we are to inquire what estate A has ; what the parties to the deed mean to do with it, and consider that by our statutes the deed alone is to be effectual to pass A's estate, and infer this is a deed of grant to the husband, this being its operation in our law, grounded on the rights of the parties and their intentions collected from the deed. Much, no doubt, may be said respecting the differences in this and other cases of conveying corporeal hereditaments between the English and our law. But in regard to these releases the only clear difference is that resulting from entry and feoffment on the land, in fact or supposed often the essence of an English conveyance, but no part of ours in law or practice ; as in the case before put, where two, E and F, disseized A, and he released to E, one of them ; by the English law it was held to be a release to E only, and he might hold F out in such manner as he might if A had entered upon the land, and put an end to the tortious estate of E and F gained by their disseizin, and enfeoffed E upon the land. This case, as thus decided, rests on an essential fact, contem-

plated as existing in this case in England, not viewed as existing in a like case in Massachusetts &c. ; that is, an entry and feoffment upon the land. In a case like this, of a disseizin by two of A, to one of them he releases, such an entry and feoffment is not to be supposed, nor can there be any privity in it ; then neither such entry and feoffment nor privity is to have any weight in construing the release ; and therefore, if a release in reality, it can operate but by extinguishment of A's title and interest in the land, and then it leaves former estates, legal or tortious, as they were, in all actions but the mere writ of right, in which the *mise* is joined as above stated. In this case in England, E, one disseizor, excludes F, the other, under A's, the owner's, release or deed ; because the English law contemplates A's act in relinquishing his right to E as an entry upon the land, as terminating the tortious estate acquired by the disseizin of E and F, and then a feoffment with livery of seizin to E alone on the land ; but such entry &c. cannot be contemplated here. And here A's deed or release to E cannot be viewed as taking effect on any such entry and feoffment, but only by force of our statutes, which declare his deed alone acknowledged and recorded, shall be sufficient to pass his interest, right, and estate in the land. Thus the principles on which the releases operate in the two countries are clearly different or distinct, though it is conceived the final result or effect is the same in both countries. As for instance, in the case last put, if A, the disseizee, release or make his deed acknowledged and recorded to E, one of the two disseizors, he will exclude F, the other ; not by reason of an entry and feoffment in fact or supposed, but because A's deed is to E alone, and F not being named in it, cannot take any estate under it, or any right under it, in the case in which the right passes from disseizee to disseizor ; and by the express provision of our statutes since 1697, our deed, acknowledged and recorded, has been as effectual to pass the right, as the estate of the party, grantor, or releasor. Our deed in this case is equivalent to entry and feoffment, so supposed to pass the right or estate, but taking its force from the statute, the releasee takes his right and estate on a principle very different from that of such entry and feoffment on the land ; and though our deed recorded cannot work a disseizin, as such entry and feoffment may, in fact or by fiction of law, yet when our deed of release is made by the owner of the land and disseizee, and recorded, to one of two disseizors in possession in fact, it may operate to give him the right of the disseizee, and to enable him to exclude the other disseizor, though not strictly to disseize him ; for as the disseizor to whom the deed is given is in actual possession, though by wrong, he is capable of taking

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CH. 110. the deed from the disseizee, and it can operate, and then this  
 Art. 5. disseizor holding under the deed may no doubt eject in an action  
 the other disseizor having no right at all. And so has been our  
 practice. As where two or more have settled on new lands,  
 the same lot, against the consent of the owner, and have claimed  
 title under some pretended deed, survey, or otherwise, and  
 one of them so in actual possession, though by wrong, has  
 obtained a regular deed acknowledged and recorded from the  
 true owner, the one so obtaining the deed has in a course of  
 law ejected the others.

§ 27. As between joint-tenants the releasor's deed is the  
 same in both countries, and on the same principle. In each,  
 the releasee claims solely by force of the releasor's deed; as  
 between them there can be no entry and feoffment on the land,  
 in fact or by fiction of law. So in both countries where the  
 releasor has no right of entry, by force of his deed of release  
 only must the releasee claim. And the only difference is,  
 in England the release has its force and effect by common  
 law only, here either by common law or by our statutes; by  
 common law to some purposes, and to others by statute law.

§ 28. So when a release operates on a possibility, its force  
 and effect is the same in both countries. In neither does it  
 pass an existing right or estate, for a possibility is neither, but  
 merely extinguishes a possibility at common law, a ground of  
 claim, which might, if not extinguished, in time become an  
 existing right or interest.

§ 29. So the distinction between writs of entry *sur dissei-  
 zin*, and writs of right, being the same in both countries, the  
 release of one having the right of property, but not of entry, is  
 the same in both, operating by extinguishing in both. So leav-  
 ing former estates as they were in all actions, but in writs of  
 right on the *mise* joined. In such writs or trials of the mere  
 right, the release of him having the right of property only is  
 considered as extinguishing his right in England, here the  
 same, or passing it by force of our statutes, not in favour of  
 any body and every body interested in the land legally or  
 tortiously, the usual effects of mere extinguishment, but in  
 favour of the releasee named in the release and in possession.  
 There has been no question except how far our statutes pass  
 the releasor's right to the releasee by the release, instead of  
 extinguishing it; and this distinction between passing the right  
 to, and extinguishing it in favour of the releasee, must be  
 allowed to be a very new one.

§ 30. In regard to our release not recorded, in respect to  
 the releasor and his heirs, to his creditors, and to those getting  
 an after deed from him, with or without notice of the former, it  
 will be found that nearly the same distinctions and rules exist,

as are stated in chapter 109 in regard to our deed of grant or conveyance; that, however, supposes the grantee to enter under, and so his entry or possession is evidence of his deed, whereas this deed of release supposes the releasee to be in possession in most cases before this deed is made in fact, and in all cases in fact or in contemplation of law, as every privy in estate is so, though not in actual possession, where another of the privies is in actual possession, not claiming adversely to the others.

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§ 31. In all cases of divided interest, as for life and in reversion or remainder, according to the Lord Chancellor's opinion, there is one invariable principle to be observed; that is, "the estate must come to the remainder-man in as beneficial a manner as ancient holders held it." Hence, if in the old leases there was a covenant to repair, it is essential it be continued &c.

1 Burr. 122,  
Cardigan,  
Earl of, v.  
Montagu.

§ 32. A release is good that refers to a lease as of the day next before the date of the release, though the lease be dated two days before; for there was a lease at the date of the release giving the lessee possession. *Ramsbottom v. Mortly*; *Gunter v. Halsey*, Amb. 586; 2 Bro. C. C. 559.

2 Maule &  
Sel. R. 434,  
*Ramsbottom*  
*v. Tunbridge*.  
—*Noy's Max.*  
95.

§ 33. One cannot release on a condition, nor for time, nor for part; either the condition is void, or the time is void, and the release shall enure to the party to whom it is made forever, for the whole by way of extinguishment: but one may deliver a release to another as an *escrow* to be delivered to A, as the act and deed of the maker, if A perform such a thing, "or a release on a condition by deed indented may be good." And the grantee may release part of a rent-charge to the grantor, and the rest remain good.

It will be observed, that nearly all the law in this chapter is common law, and hence is supported by English common law authorities, or English law adopted as common law in the United States generally, and therefore is law in all the States settled under English authority, or under laws derived from the old States so settled. As evidence of this we find, that whenever nice questions arise in the different States, as to the operations of deeds of grant, lease, release, and of other instruments of conveyance, almost all the authorities cited in the decisions thereof by the ablest judges and lawyers are such authorities derived from the common law or a part of it. Though in our conveyances we do not generally use the technical distinctions made in this chapter, yet however, they are made in good pleadings in both countries. Ch. 86, a. 4, s. 13; Ch. 91, a. 4, s. 4, a. 8, s. 12; Ch. 119, a. 2, s. 10; Ch. 121, a. 3, s. 2, 10.

Notes.

§ 34. A lease and release do not divest any estate, hence

CH. 110. do not work any forfeiture. Cruise on Uses, 106. And uses  
 Art. 6. may be declared on a release; Id.



ART. 6. *Confirmations.*

4 Cruise, 133,  
 154.—Cowp.  
 482, Jenkins  
 v. Church.—  
 Lit. sect. 515.  
 —2 Bl. Com.  
 325.—Co. Lit.  
 295.—Noy's  
 Max. 96, 97.

§ 1. This kind of conveyance is in use in this State, in substance, though the name is not often used; but it must be by deed, signed, sealed, acknowledged, and recorded; and the estate conveyed or confirmed by it, will generally be according to the intentions of the parties to the deed. The general principle is, that a void lease, deed, or estate, cannot be confirmed, but a voidable one may. The usual words are, "have given, granted, ratified, approved, and confirmed." A confirmation conveys an estate or a right in *esse*, by which a voidable estate is made sure, or a particular estate is increased; but it strengthens not a void estate, nor does it enlarge without privity, any more than a release does. 4 Cruise, 152.

Co. Lit. 296.  
 —3 Wood's  
 Con. 396.—  
 3 Co. 64.

§ 2. "Though a release by a lessor for life, to the lessee for years of his lessee, or by a disseizee to a lessee for years of his disseizor, be void, yet in both cases a confirmation is good; but a bare *interesse termini* cannot be confirmed."

6 Co. 15,  
 Treport's  
 case.—8 D. &  
 E. 487.—2  
 Bac. Abr. 574.  
 —2 Wms.  
 Saund. 418.

§ 3. If A be tenant for life, remainder to B in fee, and they, by indenture, convey to C, it is the lease of A and the confirmation of B while A lives, and after his death it is the lease of B and the confirmation of A, and a declaration, as on a joint lease, was adjudged bad. Indenture no estoppel, the reason.

3 Wood's  
 Con. 370, 371.  
 —Co. Lit.  
 295, 296.—2  
 B. Com. 321.  
 —5 Co. 15.—  
 Lit. sect. 607.  
 —2 Ch. on Pl.  
 215.—4  
 Cruise, 128.

§ 4. A confirmation does not alter the nature of the estate of him to whom it is made, who must have a precedent estate, rightful or wrongful in him to be confirmed, at least, in possession of the thing to be confirmed, else there is no foundation for the confirmation to work upon; and if the confirmed estate be avoided by entry or otherwise before confirmed, the confirmation has no effect; the prior estate, and that by confirmation, must both be lawful, or not prohibited by any statute. Confirmation by accepting rent, 4 Cruise 136.

Co. Lit. 305.  
 —9 Co. 142.  
 —Lit. sect.  
 523, 524, 532,  
 533, 545.—3  
 Wood's Con.  
 374.—4  
 Cruise, 152,  
 154.

§ 5. If the disseizee confirm the disseizor's estate, it is good in fee without the word *heirs*; for he having a fee by disseizin, that is confirmed, and the disseizor's estate is not enlarged by the confirmation. But a confirmation may enlarge an estate; so that tenant at will may have one for years, or larger; so a tenant for years, one for life, or a greater estate; so a tenant for life, one in tail, or in fee; but there must be a privity of estate, and apt words used, and a *habendum* properly worded to give such larger estate; as if a husband has an estate or land for life or years in right of his wife, and a confirmation is made to him alone, of his estate or of the land, to have and to hold the land to him and his heirs, this is a good conveyance of the fee simple to him after his wife's death.

In this case the evident intent of the deed was, that the husband should have a fee, and proper words were used for that purpose; and so far as he had a previous estate or interest, the deed was a confirmation, beyond that a deed of conveyance. But if the husband's life estate had been in his own right, it would have merged in the fee conveyed to him. With warranty discontinues an estate tail. 5 Cruise, 233.

CH. 110.  
Art. 7.

ART. 7. *Exchange.*

In exchanges of land the word *exchange* is necessary. In exchange of lands, at common law, each might enter without livery. Things in grant could never be exchanged without deed; nor can lands by our law. If a fee simple be exchanged for a fee tail, or a fee tail general for a fee tail special, the exchange is void; they must be equal in interest, as fee for fee, a term for twenty years for a term for twenty years, but need not be equal in value. A joint-tenancy may be exchanged for a tenancy in common; or a joint for a sole estate. At common law, if either party died before entry the exchange was void, for by that law no freehold could pass but by livery of seisin or entry. But it is otherwise where the exchange is by our deed recorded, and as to the parties and their heirs if not recorded, and all having proper notice of the deeds. If after exchange made either party was evicted of the land he took in exchange, or part of it, through defect of the other's title, he might return back to the possession of his own by virtue of the implied covenant of warranty contained in all exchanges; or rather the consideration of the exchange failed, and he who did not receive a title in the exchange was at liberty, at common law, to avoid the exchange, by returning to his former estate. When the books speak of this returning, and his implied warranty in the same case, as they sometimes do, they are not very consistent; for this returning is because he vacates the exchange, and goes back to his old estate; but this warranty must be when he keeps what he takes in exchange, and goes on the warranty. In our law, if there be not an express, there is an implied warranty, and it is conceived the warranty must be relied on. An exchange cannot be between more than two; therefore if three mutually grant reciprocal estates to each other, A to C, B to A, and C to B, and A is evicted of the lands granted to him by B; A cannot recover of C the lands A granted to him.

ART. 8. *Surrender.*

§ 1. This is causing by deed a less estate to fall into a greater; and yielding up an estate for life or years to him who has the immediate remainder or reversion, wherein the particular

2 Bl. Com. 323.—Co. Lit. 51, 52.—4 Wood's Con. 400 to 426.—Lilly's Conv. 131.—2 Wils. 483.—2 W. Bl. 436.—Lofft, 401, 416.—Noy. Max. 82, 83.—4 Cruise, 140.—3 Wils. 489.—4 Cruise, 139 to 142, by a minor is only voidable.—1 Cruise, 142, if one of the parties enter before either dies, the exchange is good.—3 Cruise, 385.—1 Co. 98.—4 Cruise, 140.

1 Cruise, 141.  
—2 Wils. 483.

6 Wood's Con, 518 to 552.—2 Bl. Com. 326.—fellow; nor grant.

Co. Lit. 337.—Noy. Max. 93, 94; a joint-tenant cannot surrender to his can the lessee for years surrender before his term begins, though he may

Сн. 110. ular estate may merge or drown by mutual agreement. The usual words are, "hath surrendered, granted, or yielded up."

Art. 8.



The surrenderer must be in possession, and the surrenderee must have a higher estate, in which the estate surrendered may merge. Livery was not necessary at common law, for there was a privity of estate. As a surrender is any act by deed, by which he who has a lesser estate gives it up and passes it to him who has a greater one, in one and the same estate, so that the former merges in the latter, this species of conveyance, or passing an interest in lands, is fully within the principles of our statutes and practice, though we do not often use the technical term *surrender*. 4 Cruise, 155.

1 Saund. 235c in Thurs-  
by v. Plant.—  
Cro. Car. 101.  
—4 Mod. 151.  
—2 Wils. 26,  
27.—Cro. El.  
302; though  
the new lease  
be for a less  
number of  
years than  
the old one,  
it is equally a  
surrender in  
law; & Shep.  
Touch. 301,  
the husband  
may surren-  
der his wife's  
dower for his  
life, and her  
lease forev-  
er; by deed  
indented one  
may surren-  
der on condi-  
tion.

§ 2. In pleading, a *surrender* must be pleaded; and a surrender may be in fact or by operation of law. But in surrenders expressed in words, it is not necessary to use the word "*surrender*," and words whereby the intent appears will do, and the law will direct the operation. At common law a surrender of an estate in possession in lands, for life or years, might have been by parol, without deed, and without livery of seizin, though at first created by deed. So tenant for life, and he in reversion for life, might, at the common law, join in a surrender by parol, and it enured first, as a surrender of the lessee for life to him in reversion for life, and then as his surrender. But otherwise of things in grant; they at common law could not be surrendered without deed. "If lessee for life or years grant, or release, or discharge, to his lessor, all his right, title, and estate, in or to such land, it is held to amount to a surrender, and must be pleaded as such." It appears that an estate for life or years of things which lie in grant, as of rent, or of an estate in remainder or reversion, for life or years, never could, nor can now, be surrendered without deed; nor can an estate for life or years in possession be surrendered since the statute of frauds, (29 Ch. II.) but either by deed or note in writing. But by our statute a leasehold interest for more than seven years must be by deed, because an instrument to be recorded.

"A lessee for years may surrender to him who has the reversion only for years." See much of the law as to Surrenders, art. 3, s. 24, in *Roe v. York*, and cases there cited. And a material principle is, when by virtue of a deed an estate or interest is vested, merely to cancel or destroy the deed, does not divest the estate or interest; but this must be done by another deed &c., especially since the statute of frauds, except by operation of law. Ch. 121, a. 2, s. 14; Ch. 129, a. 3, s. 1.

ART. 9. *Assignment.*

§ 1. Assignment is another kind of conveyance adopted in these States; the usual words in which are, "give, grant, bargain, sell, transfer, and set over." "By an assignment the assignor parts with his whole property, and the assignee stands, to all intents, in the place of the assignor." Most matters material on this head have been considered already, as assignments of terms and reversions in virtue of the 32 H. VIII. &c. Some few things however remain to be noticed, in order to have a just view of the principles of this kind of conveyance, as contained in the English laws, and adopted in our practice.

§ 2. Every one who has an interest or estate in lands and tenements, may assign it, as tenant for life or years, &c. So any certain interest in things lying in grant, as rent, common, estovers, &c. So a vested interest in a term for years, though the term is to commence in *futuro*, may be assigned. So if I grant ten cords of wood, in my woodland, to A, to be assigned by me; before assigned he may assign it over to another, for the interest is vested immediately.

§ 3. So if a mortgagee for years (mortgagor to remain in possession till default of payment) assigns before entry, and without the mortgagor, the assignment is good, though he was not in possession. So an assignment afterwards *toties quoties* is good.

§ 4. As to possibilities, and things not assignable, &c. see former chapters. Though a chose in action, contract, right, or cause to have an action for a duty, or wrong, cannot be assigned, as above stated; yet in equity a chose in action may be assigned to some purposes. Therefore in a case of a policy of insurance, the court so far takes notice of an assignment, as to permit an action to be brought in the name of the assignor; and if he become a bankrupt, he may sue the debtor, for the benefit of the assignee.

§ 5. "Assignment being by deed, and conceived in the words, given, granted, bargained, sold, assigned, and set over," operates indiscriminately either as a gift, or grant, or sale, or assignment.

§ 6. The assignment, or grant, or bargain and sale, of an estate for years to a use, is not executed by the statute of uses, for there is no seizin to the use, but only a possession to use.

§ 7. A lessee for years may assign his interest before entry, but not if the lessor be disseized. As if A make a lease for years to begin at a day to come, and before that day A is disseized, B cannot assign his interest; for while the lessor remains in possession, that is, is privy in estate to the lessee,

CH. 110.

Art. 9.

2 Wood's  
Con. 154 to  
632.—1 Com.  
D. 551 to 556.  
—2 Bl. Com.  
326, 327.—2  
W. Bl. 326,  
766.—3 Wils.  
234.—Doug.  
56, 174.—4  
Cruise, 160,  
161.

5 Co. 25.—  
Cro. El. 819.

3 Lev. 388.—  
1 Com. D.  
552.—4 Mod.  
48.

1D. & E. 26,  
& 619.

2 Wood's  
Con. 155.—  
Co. Lit. 301.

2 Wood's  
Con. 155.—  
27 H. VIII.

Leon. 156,  
158.—2  
Wood's Con.  
156.

CH. 110. there is no impediment to his assigning his interest ; but when  
 Art. 9. the lessor is disseized, that possession is destroyed, and there  
 is an adverse possession as to the lessor and lessee both.

6 Burr. 2831,  
 Bush v. Phil-  
 lips.

§ 8. In this case it was decided in England, that since the statute of frauds an assignment may be by a note in writing only. By this statute in England "a lease for any term of years may be created by writing, without deed ; and that the same may be surrendered by deed, or note in writing," and so assigned by writing only. This is different in this State, at least as to leases for seven years or more, for then the lease must be by deed recorded, and the surrender or assignment of it must be in the same manner, according to the requirements of our statutes to be valid against all persons.

2 Bos. & P.  
 43, Cart-  
 wright v.  
 Amatt & al.

§ 9. *An assignment vesting the property on a suit's ending &c.* As where the defts. by indenture recited a suit was pending between them and B as to certain patents, and that the same could not be assigned without hazard of defeating the suit, and granted absolutely the said patents with some others to the plts., excepting until the termination of said suit such patents as should be necessary to support defts. legal title ; then they covenanted on the termination of said suit they should assign the excepted patents to the plt., and until such assignment defts. to stand legally possessed of the same. Held, the legal interest in the excepted patents vested in the plt. on the termination of said suit, and without assignment.

2 Bos. & P.  
 63, William-  
 son v Butter-  
 field & al.  
 exrs.

§ 10. A possessed of a lease for years covenanted in an indenture for making a family provision, that if he should die during the term, his executors or administrators should assign the residue of the term to B ; A afterwards bought the reversion in fee, and died. Held, he had a right so to do, though it put an end to the term and left none to be assigned, and B on his part was to make certain family provisions only in case the term was assigned to him.

4 Cruise, 160,  
 161. Must  
 be by deed.  
 Ch. 106, a. 6.  
 —2 Cruise,  
 452.

§ 11. By a lease a man conveys an interest less than his own, reserving to himself a reversion, but by an assignment the assignor parts with his whole interest in the thing assigned, and puts the assignee in his place,—need not be in technical words. If one conveys his whole term, but reserves a rent to himself, this is no assignment, but an under-lease. Contingent estates are assignable in equity before the contingency happens ; *secus* at law. 6 Cruise, 522. But an assignment does not exonerate the assignor from his covenants. 4 Cruise, 70.

CHAPTER CXI.

SAME PRINCIPLES, CONDITIONS AND DEFEASANCES.

**ART. 1. General principles.** Though our conveyances in mortgage include conditions and defeasances, yet it is best to consider our mortgages in a chapter by themselves. A defeasance differs from a condition in this ; a condition is part of the deed, or annexed to it ; but a defeasance is a deed by itself, agreed between the parties and having relation to another deed. There are many conveyances of lands and real estates on condition, or with defeasance in every country, or in which conditional conveyances are made. In this country where much money is borrowed on landed security, and where real estates are given as pledges with as much ease as personal, conditional transfers of lands are very common ; but these being generally in the form of mortgages, which will be considered in another chapter, it is necessary in this to consider conditions and defeasances, but upon general principles, and as they in general affect deeds of conveyance and the covenants and warranties in them. What is a defeasance ; see also Ch. 32, *Harrison v. Trustees of P. A.*, where it is said a defeasance to a deed of land must be of the same date. Conditions &c. are expressed or implied ; 2 Cruise, 2 ; are precedent or subsequent, 3 ; can be reserved only to the donor, lessor, &c. 2 Cruise, 5, 6 ; and as to things executed must be at the time of making the estate, 5 ; and must defeat the whole estate, 6, 304. Conditions as to marriage, see in *terrorem* &c.

Ch. 135, a. 2, s. 16 to 19, as to remainders on condition &c.—*Noy's Max.* 98, 101.

**ART. 2. Defeasance what.** § 1. A defeasance is a separate deed relating to another, but between the same parties, providing the other to be void, if he who makes it, his heirs, executors, or administrators do some specified act. The deed conveying the land, and the defeasance refer to each other, or only the defeasance to such deed ; both must usually be made at the same time, they are as one instrument, and have only the effect of a deed with a condition in it. Judge Blackstone speaks of the defeasance as a part of the deed ; and Willes J. held, a defeasance may be to a deed without express words or relation. So this relation may be in express words, or only as to the matter. As to the matter, as in the following case. As where debt on bond was brought, made by the deft. to the plt. for £80, dated June 24, 1727 ; the deft. had oyer of the condition to pay £41, Dec. 25, 1727 ; and pleaded that the

4 Cruise, 163. A fee never void absolutely for condition broken, but voidable by entry only ; *aliter* of a term. 1 *Caines' R.* 426.—2 *Bl. Com.* 327.

*Willes*, 107, 111, *Trevett v. Aggas*.

CH. 111. 12th of March after he paid all but £40 ; when the plt. by his  
 Art. 2. deed covenanted with the deft. that if he paid 5s. in the pound



&c. due from him to the plt. before Dec. 25 following, he would accept this in full "of all such money as then was, or on the 25th of December should be due from the deft. to the plt ;" and that this last deed should be a sufficient release for the debt for all such sums, and pleadable in court &c. ; also, the deft. pleaded when the said deed was given by the plt. to the deft., he was indebted to him only in said £40, and was ready to pay the 5s. in the pound &c. The plt. demurred, and objected that this last deed of March 12 was no defeasance to the bond ; but the court held it was, and might be pleaded as such, that it was more than a covenant, and that whenever an instrument can be pleaded as a defeasance, it ought to be, to avoid circuity of actions, which the law always abhors. Here it may be observed, that the defeasance did not mention the bond or apparently refer to it ; and so was made to refer to it by such averment in the deft's. plea, as shewed it could not refer to any thing else.

Cro. El. 623,  
 Hodges v.  
 Smith.

§ 2. In this case the last deed only stated the first deed should be void on payment ; this was an action on a bond of £200 ; plea, that after it was made the plt. by indenture did covenant, that if he paid £100 at such a day, the bond should be void, and averred he paid &c. Plt. demurred ; and judgment for the deft., for the covenant enures as a defeasance to the bond, though made after that was ; and to avoid circuity of actions the deft. should not be put to his action of covenant.

Cro. El. 716,  
 Manhood v.  
 Crick.

§ 3. But in an action on a single bond, plea that after it was made the deft. gave another bond of £14 to the plt., conditioned to pay £7 at a place and day to come, not yet come, which the plt. accepted in discharge of the first bond ; the plt. demurred, and judgment for him. This was the case of a single bond.

5 Com. D.  
 641.—8 D. &  
 E. 168, Dean  
 v. Newall.—  
 12 Mod. 552.

§ 4. *A writing not under seal is no defeasance to a deed.* And if A and B give a bond to C, and he afterwards covenants not to sue A, but that the covenant shall be a discharge of all debts due from him to C, he may still sue B, and this is no defeasance, but is a covenant ; however, a covenant may be a defeasance by construction to avoid circuity of action.

12 Mod. 221,  
 Clayton v.  
 Kynaston.

§ 5. In this case the court held, that two deeds made at the same time, not having reference to each other, could not be construed as defeasances. But see *Trevett v. Aggas*.

3 Com. D.  
 328, 329.—  
 3 Wood's  
 Con. 126.

§ 6. "That which in the same deed is called a condition in another deed is a defeasance ;" and a defeasance to be valid must be by matter as high as the thing which is to be defeated, as if one be by deed, so must the other be, on the general principle, that *unumquodque dissolvi eo ligamine quæ*

*ligatur* : and must be between the same parties ; therefore, if A make a bond to B for £20, and B make a defeasance to C, that if he pay him £20, A's bond shall be void, this defeasance is void. But if a statute be to husband and wife, the husband alone may make a good defeasance, and it must not be made before the deed, and must be of a thing defeasible. The husband has the control of the statute.

CH. 111.  
Art. 3.

Bro. Defea-  
sance, 3, 5.—  
3 Wood's  
Con. 126.

§ 7. By the old law, "estates of inheritance executed and settled in possession by livery, or by release from disseizor to disseisor, could not be defeated by defeasance made after," but might be by one made at the time. "But rents, conditions, warranties, &c. might be defeated by defeasances made afterwards, for such inheritances were executory." And it is well settled, that a deed or bond may be defeated by a defeasance afterwards made ; but not an estate vested.

2 Bl. Com.  
327.—Co.  
Lit. 236, 237.  
—Salk. 673,  
675.—1 Esp.  
249.—Cro.  
El. 755.—  
2 Saund. 48.

§ 8. If the feoffee with warranty, grant or covenant, that neither he nor his heirs shall take benefit of the warranty of the feoffor or his heirs, this is a good defeasance of the warranty ; and so if he covenant not to vouch, this will discharge the voucher. So if one makes a lease for life by deed, and by another deed covenants with the lessee that he shall not be impeached for waste, this is a good defeasance to the first deed and a good discharge ; and if the lessee afterwards grants or covenants by deed to the lessor, that if he shall bring an action of waste against the lessee, that he will not make use, nor take advantage of the deed of discharge, this is a good defeasance and discharge of the discharge, or a good defeasance of a defeasance. So if a policy or other instrument refer to printed proposals, they are a part of it, and may be a defeasance, condition precedent or subsequent &c., as the case may be.

3 Com. D.  
126.

6 D. & E. 710,  
Worsely v.  
Wood.—Also  
2 H. Bl. 574.

§ 9. Our statute as to defeasances, passed June 23, 1802 ; see Ch. 109, a. 5, s. 20.

§ 10. A writing not under seal is not a defeasance in law, though it be in equity, to a deed under seal ; but our courts have no power to consider it in equity.

4 Mass. R.  
443, Kelloran  
v. Brown.

§ 11. To take advantage of a condition, an entry by a stranger without authority is good, if afterwards assented to ; actual entry is necessary to avoid a fine. 1 Johns. Cas. 125.

2 Stra. 1128,  
Fitchet v.  
Adams.—  
Doug. 483.

§ 12. If there be a *proviso* in a lease, the lessee shall not alien &c., lessor cannot dispense with an alienation for a time, and then subject the estate to the condition ;—it is entire.

4 Co. 119.—  
2 Selw. 408.

ART. 3. *Conditions repugnant, impossible, &c.*

§ 1. Some repugnant conditions are void, and some not. As in *Mildmay's* case it was decided, that if A made a gift in tail to B, on condition he shall not suffer a common recovery

2 Cruise, 5, 7,  
8.—6 Co. 40,  
Mildmay's  
case.—Co.  
Lit. 202, 206.

—Pow. on Con. 260.—Mod. 271, *Spittle v. Davis*.—5 Bac. Abr. 811, Am. ed.

CH. 111. ery, nor commit waste, nor his wife have dower, these condi-  
 Art. 3. tions are repugnant to the nature of the estate, so against law and void. So a proviso, that a warranty with assets, or a collateral warranty, shall not bar the issue in tail, is repugnant and void. But a condition to restrain an unlawful sale is good; as to restrain an infant from selling during his minority, but not after he is of age. But a lease for life or years, on condition the lessee shall not alien or lease, is good and valid; for in this case there is a confidence between the lessor and lessee. Many cases where one's estate is to cease on alienation or attempt to alien, see 5 Bac. Abr. (Am. ed.) 809, &c.

2 Bl. Com. § 2. If express conditions be impossible at the time, or be-  
 157.—Hob. come so by the act of God, or of the feoffor, or if against  
 170, 261.—3 law, or be repugnant to the nature of the estate, they are void;  
 Salk. 95.— and if subsequent conditions, the tenant's estate is absolute;  
 Lit. 206, 218. but if precedent, or to be performed before the estate vests,  
 —Pow. on the grantee takes nothing. As where A infeoffs B on condi-  
 Con. 263, 266. tion if A or his heirs, by such a day, pay B £20 his estate to  
 —5 Bac. Abr. cease, and before the day A dies without heirs, B's estate  
 (Am. ed.) 809. shall not be avoided; for it is vested, and by the act of God  
 —3 Com. D. there is none to perform the condition. And a condition may  
 77.—Watkins, be annexed to an inheritance, or freehold, or term of years.  
 56, 133, 172. Not to alien to a particular person, is valid. 2 Cruise, 8.  
 —Not to alien in mortmain, is good, Id.

As to estates § 3. A condition may be void as annexed to an estate, but not  
 in tail, a con- a covenant to the same effect. As if A grant lands to B in fee, a  
 donee shall not condition he shall not alien, or take the profits, is repugnant  
 marry, is to the nature of the estate, and so void. But B may cove-  
 void, 2 Cruise, nant or give bond conditioned to do neither, and each is valid and  
 8; so shall good; for if he will forfeit his covenant or bond, he may alien  
 not bar the or take the profits, so there is no total bar to alienation or re-  
 entail, 9; so ceiving the profits; but it is otherwise as to such condition ad-  
 that the es- ded to a feoffment, for if that were, good, no alienation or  
 tate end as if taking the profits could take effect. But not to alien a great-  
 the tenant er estate than he has, is good. 2 Cruise, 8.  
 were dead, is void, 304.


Pow. on Con. § 4. So a lawful possible condition may neither accomplish  
 263, 264.—A nor dissolve a bargain, but only vary it. As if the mortgagee  
 lease for agree, that if the mortgagor pay the interest, six per cent.,  
 years may be in one month after due, one per cent. shall be abated if the  
 on condition mortgagor so pay, the agreement is changed from six to five  
 to end with a per cent. Implied conditions may be annexed to estates for  
 bankruptcy, life or years. 2 Cruise, 8.  
 2 Cruise, 13.

1 Salk. 172, § 5. There is a difference between a *condition impossible*,  
 Pullerton v. a *part of the contract*, and one annexed to it by endorsement  
 Agnew. or underwriting: per Holt C. J. Where the impossible condi-  
 4 Cruise, 167. tion is endorsed or underwritten, that only is void, and the  
 obligation is single; but where the condition is a part of the  
 lien itself, and incorporated with it, the obligation is void.

§ 6. Some conditions are mere circumstances that do not suspend, annul, or alter the contract. As if A agree to convey lands to B on such a day, disencumbered of a lease; this is only a stipulation, a mere circumstance in the performance, which admits of compensation, if the conveyance be not at the day, and is not a condition strictly to be observed, and if not strictly performed to defeasance or annul the contract. How remainders arise of condition, see Remainders, Ch. 135.

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Art. 4.

  
Pow. on Con-  
267, 268.

§ 7. On a *disjunctive* condition, if the obligee prevent the obligor's performing one part, the obligor shall be excused performing the other, otherwise the obligee might take advantage of his own wrong. Condition precedent, how performed. Deft. gave a bond to the plt. to convey land to him on his paying a note of a certain date; deft. pleaded, the plt. had not paid it; replication, another note for the same sum, but of a different date, was given and paid; demurrer, admitted this fact: Held, performance. 15 Mass. R. 160.

1 Ld. Raym.  
270, Stub-  
holme v.  
Mandell.

ART. 4. *Who performs conditions; effect of performance, &c.*

§ 1. Regularly when one conveys an estate on condition, and enters for condition broken, he is in of his old estate, but there are exceptions necessarily to this rule. As where one is seized in the right of his wife, grants on condition, and dies, and his heir enters for condition broken, (as the heir of him making the condition must enter for the breach,) the heir's estate vanishes immediately, and vests in the wife by operation of law; for it is impossible for the heir to be seized as the grantor was, that is, in the wife's right. If tenant for life make a feoffment on condition, and for the breach thereof re-enter, he is tenant for life still, but remains subject to the forfeiture. 2 Cruise, 34, 35, 36.

Co. Lit. 202.

§ 2. If I be the cause another person does not perform a condition in any case, I never shall be allowed to take advantage of his non-performance, where the condition is subsequent; but the case is otherwise if the estate is to arise on a condition precedent. If become impossible, is to be performed as near the intent as it can be.

Co. Lit. 206,  
218.—2 Bl.  
Com. 156,  
157.

2 Cruise, 35.

§ 3. If a feoffment be made on condition that if the feoffor pay £10, (no day of payment is named,) he may re-enter, he has during life to pay; for the feoffee has the land in the mean time; and if the feoffor die, his heir cannot perform the condition, for the time limited by law is expired.

Co. Lit. 206.

2 Cruise, 36.

§ 4. If a lessee for years reserves a condition, his executors or administrators shall take advantage of it, as it is a chattel interest. "A a grantee of a reversion may have benefit of a condition in law."

§ 5. An estate given to the wife for life, on condition she

4 Co. 165,  
Vernon's  
case.

CH. 111. perform her husband's will, is a good jointure, an absolute estate, and bars her dower ; because she may make it absolute if she pleases by performing the condition.

Art. 5.  
Co. Lit. 203.

§ 6. The law gives a re-entry in some cases for condition broken. As where A infeoffs B and his heirs, on condition he pay such a rent, or provided always he pay it ; or so that he pay it, and he does not, A may re-enter for non-payment, though not said expressly in the deed he may re-enter for non-payment, or for condition broken, and also though he has received part of the rent ; but B may enter again and recover the estate, on paying all the arrears, or on tendering them upon the land. So on an implied condition broken, the grantor may re-enter ; as where a woman conveys land to A to convey to her and B, whom she intends to marry, and afterwards B refuses to marry her, she may re-enter.

4 Bac. 320.

§ 7. A devisee, or *heres factus*, may take advantage of a condition broken.

Hob. 286.—2  
Cruise, 6, 36,  
61, 308.—3  
Cruise, 498.

§ 8. And so a husband may. As where land was devised to a *feme* executrix during A's minority, to hold to her own use, without account, provided "she keep and educate A at school," &c. ; she married ; and the court held, that the law gave this term to her husband, and that he might perform the condition ; this was a trust in the *feme*, but the law favours marriages ; and if the condition could not be thus performed by the husband, it could not be performed at all, unless she remained single. Entry for breach of condition, 2 Cruise, 49, 55.

Co. Lit. 274.

§ 9. A condition cannot be released upon condition, nor can a *chose in action* be released but on condition precedent.

There is a clear difference between words that actually make a condition, and such as are only descriptive of the time when, and manner how, a remainder or an estate is to arise and take place ; often in a deed or will the word *condition* has no relation to the prior estate to defeat it, and the true meaning of a condition is to abridge and shorten the estate.

#### ART. 5. *Conditions construed limitations.*

Cro. El. 205,  
Wilcocks v.  
Hammond.—  
Co. Lit. 236.  
—3 Com D.  
121.—2 Mod.  
7, & post.—2  
Bl. Com. 255.  
—See Ch.  
135, a. 2, s.  
19.—4  
Cruise, 429.

§ 1. As if a devise of lands be made to A, paying B £20 in two years, it is a condition ; but if A be heir to the devisor it is construed a limitation, and the estate determines without entry, on non-payment ; for as a condition, it is void, for then only he who is to pay can take advantage of it, as a condition "descends to him that is heir to the condition," and so there would exist no remedy to compel him to pay the money ; therefore the law construes it a limitation of the estate, and that it cease if he do not pay, and go to the heirs, (Borough English,) the paying makes a fee, and the value to be paid is

not material ; and in a devise, an estate in fee may cease in one and be transferred to another. 2 Cruise, 56, 314.

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Art. 5.

§ 2. It is material here to observe, that the same principle applies where there are several heirs, and land is devised to one paying another. As where there are two daughters and heirs, and land is devised to one paying £10 to the other, the other for non-payment may enter into a moiety of the land. A like case often happens on our statutes. So where "lands are devised to executors to be sold, or his land to be sold by his executors, which is all one;" they take the profits, and if they do not sell in convenient time, the heir may enter, as on a limitation ; and it is no plea that the money offered for the lands is not their value. But "when one devises that his executors shall sell his lands," they may do it at any time, for in this case they shall not take the profits. Have a naked power to sell, and the heirs &c. take them.

Co. Lit. 234.  
—1 Bac. Abr.  
398.—Cro. J.  
56.—4 Bac.  
Abr. 318 to  
324.—So a  
devise to one  
heir to pay  
another &c.,  
same rule, 6  
Cruise, 428,  
case of  
Crickmer.

§ 3. So if lands be devised for life or years, on condition, remainder over in fee, this shall be construed a limitation, for otherwise by entry for condition broken, the remainder would be destroyed, as before that begins the prior estate is destroyed, created with it.

3 Com. D.  
121, 122.—6  
Bac. Abr.  
(Am. ed.)  
800, &c.—Ch.  
135, a. 2, s. 18,  
19.

§ 4. Where livery makes a condition subsequent. As if A grant lands to B for five years, and if he pay 40s. in two years, then B to have a fee, otherwise but an estate for five years, and livery be made to B, he has a fee conditional, by construction of law, though the words seem to make a condition precedent. But as livery cannot expect, but operates to pass the estate or land at the time or not at all, it shall be construed a condition subsequent. But if a thing that lies in grant be granted for years with such a condition, the fee shall not pass till the condition be performed. Which does our conveyance, by deed recorded, most resemble, the above in livery or in grant? Do the expressions in our statute, that the deed shall be sufficient to pass the estate, without any other act or ceremony, and be good against the grantor and his heirs, though not recorded, pass an estate before a condition is performed, which in its words and import is a condition precedent? Perhaps not ; as, on a fair construction, our deed is not to pass the estate but where the intention of the parties is to pass it, and that intention is expressed ; but where there is such a condition the intent seems to be not to pass the estate till the condition be performed. The execution of our deed, or even recording of it, does not necessarily pass the estate as livery of seizin did, as this seems necessarily to have had the effect to turn a condition precedent into one subsequent.

§ 5. *Distinction between a condition and limitation.* The first defeats the estate, but requires a re-entry by the seoffor

CH. 111. &c., or his heir ; but a limitation determines the estate *ipso facto*, without entry : as to the condition no stranger can take advantage ; but *secus* of a limitation. 2 Cruise, 56 ; 1 Inst. 214.

ART. 6. *Power to sell lands when well performed or not.*  
 4 D. & E. 39 to 71, Doe v. Martin. §. 1. Powers in numerous instances are given to persons by wills, by deeds, and courts to sell lands, applying the proceeds of the sale in a certain manner specified ; and it is sometimes a question of importance how far it concerns the purchaser of such land to see the purchase money applied in the manner specified. In this case this question arose. It was thus ;—J. S. settled an estate on A, in trust for B for life, with power to appoint the same among his children, and in default of such appointment, then, absolutely in trust for his children ;—also with power in B to dispose of and sell the estate, “so as” that the purchase money be vested in the hands of the trustees, and applied to purchase another estate, and for the same uses. B sold the estate to D, whose agent consented that B should retain the purchase money, and which therefore was not so vested and applied.

§ 2. The court decided that the sale to D was void ; for B had power to sell only on condition “so as ;” and D, the purchaser, did not see this condition complied with or performed ; but his agent consented to a misapplication of the purchase money, and even to a fraud ;—and the fraud of the agent is that of the principal. The children had vested remainders, to open as they came into being, and estates in fee subject to the power of selling on condition of revesting the proceeds to like uses ; and the sale and revesting were “to be considered as one deed and act.” Though the fraud appeared, the court seem to have decided on the ground that the power to sell was on condition the purchase money should be paid to the trustees and then applied to the new purchase ; and because neither was done, the condition was not complied with, and so the deed was void.

§ 3. The principles of this case have some application to our numerous cases of executors, administrators, and guardians, when they have power, by order or license of court, to sell real estates of testators, intestates, and wards ; as this power is by the statute given, “provided,” or on condition, they advertise the time and place of sale &c. in a certain manner ; and also “provided,” or on condition they first give bonds to observe certain rules, “and that the proceeds of the said sale, after the payment of just debts, legacies, taxes, and just debts for the support of minors, and other legal expenses, and incidental charges, shall be put on interest, on good security, and that the same shall be disposed of according to the

Mass. Act,  
 March 4,  
 1784.

rules of law." It has been settled that the buyer of such real estate must see the first condition performed as to advertisements &c.; and the same principle seems to apply as to giving bonds, the other condition; but as to the application of the purchase-money the bond must be intended to be the security. There is one general principle running through these and all similar cases. It is this; the purchaser must see to such application of the purchase money, or that such condition is performed at his peril, when thereof he can have reasonable notice, as if to advertise, or to give bond, or pay monies in a special manner named; but otherwise when he so cannot have reasonable notice of the acts to be done, as if to pay debts generally, not naming any persons to whom to be paid.

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*ART. 7. Grantee disables himself to perform conditions;—the effect a covenant and no defeasance &c.*

§ 1. As if A enfeoff B, on condition B re-enfeoff A, and B disables himself to do it, by selling or incumbering the land, A may enter immediately for condition broken, and A's vested right to enter is not taken away by B's afterwards removing the impediment. But if B be to re-enfeoff A on a certain day, then it is sufficient B have the estate free on that day. If A and his wife be to be re-enfeoffed in tail, remainder to A's heirs, and he dies, the land shall be conveyed as near the intent as it can be.

Co. Lit. 221.

Co. Lit. 219.

§ 2. What is a covenant and not a defeasance was decided in this case on clear principles. The case was thus:—the deft., Kynaston, May 1, 1676, covenanted to pay the plt. £100 &c. in a certain case; this he sued for; and on oyer of the deed the deft. pleaded, that, May 6, 1676, the plt's. intestate and others, jointly and severally, covenanted with the deft. that if he left off acting as one of the company, (at the theatre) and gave three months' notice &c., he should have a certain allowance, and be discharged of all debts &c. due from him, and be saved harmless therefrom, and that he did so leave off and give notice. The question was, if this last indenture of May 6th was a mere covenant, or a defeasance of the covenant of May 1st, in which the deft. was bound to pay the plt. the £100 after her intestate's death. And the court held, the deed of May 6th, not to be a defeasance, but a covenant; because, 1st. If a defeasance it discharged all the covenantors, as if a defeasance be to one it is to all; but a construction is not to be admitted that discharges others jointly and severally bound.

12 Mod. 548  
to 553, Lacy  
v. Kynaston.

§ 3. Second. These deeds intended mutual remedies, and so not to be construed defeasances. And here are other

CH. 111 matters in these instruments, in which they must operate by  
 Art. 8. agreement and not by defeasance.

§ 4. Third. A defeasance is such that on condition performed, the thing to be defeasanced ceases, and here if construed a defeasance, it will not be because the words import one, but from the nature of the thing; but there is no reason for making it a defeasance, but to make it one is unjust, as it would make the plt. without remedy, as it would discharge others bound to him. If A grant land to B in fee, on condition he shall not alien to D, B may sell to a third person, and he sell to D. Leases may end by condition, 4 Cruise, 118; of re-entry for non-payment of rent, 3 Cruise, 330; is implied in an exchange, 140; where a compensation can be made equity relieves as to the breach of the condition, 2 Cruise, 46; where not, it directs a re-conveyance in several cases, 48.

Doc. & Stud.  
 Dial. 2, s. 35.

2 Cruise, 26,  
 Mansel v.  
 Mansel.

ART. 8. *Several matters.* § 1. An act to be done attending a power is a condition precedent, and must be performed before the power can take effect. As where A devised to his son B for life, and added that B "shall be capable, with the consent of the said trustees, to settle a jointure on the woman they agree to in writing he should marry;" A died leaving B married; but his wife died, as also both trustees; B married again and settled the whole estate on his wife by way of jointure: held void, as he should have had the consent of the surviving trustee's heir. Willes, Lord Commissioner, said, it was a condition precedent, and not being performed, no estate could arise. But such conditions in restraint of marriage, are construed strictly, whether precedent or subsequent; hence, if the condition be to marry with the consent of trustees, the father's consent is sufficient, his intention being otherwise substantially complied with, he having made the condition, and may be dispensed with if the other party refuse to marry, being named. See *Long v. Dennis*, ch. 43, a. 1, s. 5. But where the estate is given over, the breach of the condition cannot be got over. Lord Mansfield in *Long v. Dennis*; and see *Scott v. Tyler*, ch. 43, a. 5; and *Stackpool v. Beaumont*, 3 Ves. jr. 89, 98.

2 Cruise, 27,  
 Clerk v. Lucy,  
 Robinson v.  
 Comyns, 28.  
 —And 2 Atk.  
 261.

§ 2. A widow may be restrained from marriage. As where A devised lands to his wife and her heirs, but if she married again, then over to his daughter in fee; the wife married again; held, the daughter should have the estate.

2 Cruise, 41.  
 —1 Roll. Abr.  
 421.

§ 3. Conditions are binding in grants to minors and married women;—also a minor heir is bound by a condition. In each case it does not charge the person but the land, then personal disability does not avail.

§ 4. *Limitations over on a conditional termination of a pre-*  
 1 Salk. 229,  
 Scatterwood  
 v. Edge, cited 2 Cruise, 293, 294, 295.—Ferne, 362.

*ceding estate, and this never taking effect at all.*—As where A devised to trustees for eleven years, remainder to the first and other sons of A, successively, in tail-male, provided they should take the testator's surname, and if they or their heirs refused to do this, or die without issue, then over to B's first son in tail-male, provided he took his surname, and if he refused or died without issue, then to the devisor's right heirs; A died, never having had a son, B had a son at the time of the devise: held, the limitation to the first son of B took effect, being then *in esse* and capable; and that the preceding condition, as to A's first son did not operate as a precedent condition, which must happen to give effect to the after limitation to B's son, but was only a precedent estate, attended with such a limitation. And, generally, if the preceding limitation, or estate, by any means whatever be out of the way, the subsequent limitation takes effect; and if this be not defeated by the prior estate's failing, where the whole estate is first limited, then it will not be defeated if the whole fee is not at first limited, but the remainder, though conditional, includes the whole residue of the estate, not before otherwise disposed of. See ch. 43, a. 1, s. 6; ch. 629, a. 2, s. 33; ch. 114, a. 31, s. 11; ch. 135, a. 2, s. 12, 13.

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1 Ves. 422.

Cro. J. 448.—  
1 Burr. 228.

§ 5. *Conditions by what words created in deeds*:—are *sub conditione*, 1 Inst. 202; so the words, *proviso* and *provided always*, 2 Co. 70. If used to make an estate conditional, the proviso must not depend on another sentence, nor partake thereof, but stand originally of itself, *id.* 2. The proviso must be the words of the donor, feoffor, bargainor, &c. 3. That it be compulsory to enforce the donee, feoffee, bargainee, &c. to do an act, *id.* “The said proviso makes a condition, for the law hath not appointed any place in a deed proper or peculiar to a condition; but its place is where the parties please.” Lease by indenture, and the parties agreed that the lessee should not do a certain act, on pain of forfeiture of his estate; held, a good condition. So if lessee covenant and agree with the lessor not to grant, assign, or sell the land on pain of forfeiture of his term, it is a good condition.

4 Cruise, 467.  
—2 Co. 69 to  
82, Crom-  
well's case.—  
1 Inst. 203.

§ 6. *In a will.* Lord Coke holds, that many words in a will make a condition in law, that make no condition in a deed; as a devise of lands to an executor to sell; so if lands be devised to one to pay £20 to J. S. or paying £20 to J. N. this amounts to a condition. A condition cannot be devised. 6 Cruise, 21. As to what excuses the breach of a condition, as the act of God &c., see *Laughter's case*; *Thomas v. Howell*, 1 Salk. 170; *Cro. El.* 780; *Hutton*, 48; 1 H. Bl. 370.

6 Cruise, 428.  
—1 Inst. 236,  
see art. 6, s.  
1.—1 Inst.  
206, 218,—  
5 Co. 21.

§ 7. *Conditions void.* As where contrary to the divine or municipal law: 1. To do something *malum in se* or *malum*

2 Cruise, 7.—  
1 F. W. 189.

CH. 112. *prohibitum*: 2. To omit doing something that is a duty:

Art. 1. 3. To encourage such crimes and omissions. These are all the instances of conditions against law, and these it will ever defeat.

2 Cruise, 8,  
&c.—7 Co.  
110.—Hob.  
170.—Cro.  
El. 26, 331,  
Dumport's  
case.—4 Co.  
119.

§ 8. Conditions repugnant to the nature of the estate to which annexed are void. 1 Inst. 206; 3 Leon. 132; see ante; 8 D. & E. 61; Ambl. 379; 1 Inst. 233; Dyer, 343. But in several cases bonds given by tenant in tail &c. not to commit waste, nor to do what by law they may do, have been held good, in other cases not. 2 Cruise, 8, &c., several cases, *Jarvis v. Briston*; 3 Vern. 351, *Freeman v. Freeman*.

2 Cruise, 35,  
36.—2 Inst.  
219.—Lit.  
s. 362.—2  
Freem. R.  
186.

§ 9. *Conditions* that destroy an estate must be performed strictly; but one that creates an estate is to be performed by construction of law, as near the condition as may be, and according to the intent and meaning of the condition, though the letter and words of the condition cannot be performed. So if a literal performance become impossible by an after event. But if there be a condition precedent copulative, the whole must be performed before the estate can arise. Com. R. 732.

§ 10. It is a general rule, that any one may perform a condition, who has an interest in it, or in the land whereto annexed, as the feoffee's feoffee &c., and if a time to perform be appointed, the purchaser may perform. *Marks v. Marks*.

## CHAPTER CXII.

### MORTGAGES.

ART. 1. *General principles.* § 1. Our conveyances in mortgage are in part on common law principles, and in part on our statutes. All these conveyances of lands and of interests in lands must be in writing; and of such interests for more than seven years, must be by deed signed, sealed, acknowledged, and recorded, by force of the statutes already stated. These conveyances are made at common law with conditions and defeasances, but modified and regulated by our statutes; but all deeds and instruments of defeasance must be recorded like other deeds of lands or of interests in land. The mortgagor has no power to under-let, is only tenant at sufferance, and not entitled to notice to quit. 3 East, 449, *Thunder*

v. Belcher. Nor can he commit waste ;—cannot make a lease to bind the mortgagee. 2 Cruise, 108.

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Art. 1.

§ 2. *Common-law principles.* The right and interest is in the mortgagee by law before forfeiture. He is, as it were, a purchaser for a valuable consideration, and is deemed in possession on the execution of the mortgage, and if the money be not paid, he may bring ejectment without actual entry. "The mortgagor has no interest in the premises, but by the mere indulgence of the mortgagee." "He has not even the estate of a tenant at will ; for it is held he may be prevented from carrying away the emblements, or the crops which he himself has sown." But this limited interest is only as to the mortgagee. 2 Cruise, 107, 108, 111, 112, &c.

Dougl. 21.  
Law Grammar, 121.—  
2 Lilly's Abr.  
—Dougl. 266,  
Mess v. Gillemore.—Chris.  
Notes, 2 Bl.  
Com. 18.—  
1 Vesey, 361.  
—15 Vin.  
Abr. 44.—  
2 Burr. 978,  
in Martin v.  
Mowlin.—  
2 Bac. Abr.  
416.—2 Bl.  
Com. 158.—  
Sul. 99.—  
2 Cruise, 109.

Mortgages are deemed part of the personal estate, and whatever words in a will give the debt, carry the mortgaged land with it ; the heir or executor may pay the mortgage money ; the estate in the land is the same thing as the money due upon it. It will be liable to debts ; it will go to executors." "The assignment of the debt, or forgiving it, will draw the land after it as a consequence." Mortgagee has ejectment without notice ; this is in equity.

§ 3. But the doctrine in England, that if the third mortgagee buy in the first, he postpones the second mortgage, does not hold in this State ; for if the second mortgage here be seasonably recorded, it holds good, and if not recorded and not known to exist by the third mortgagee, and his third mortgage be recorded, it is preferred, because recorded first, on the principles above stated, if there be no fraud. And in England third mortgagee must not know of the second.

Mosely's R.  
55.—2 Bl.  
Com. 158.—  
2 Mass. R.  
493.—Sul. 98,  
99.

§ 4. As soon as the estate is created, the mortgagee may enter immediately on the lands, unless it be agreed to the contrary. This point is now settled, though Sullivan doubted if on our statutes the mortgagee could enter before the money became due, and stated, that he had known of no entry or suit prior to the time of payment, and that our statutes directing the mode of making up judgment seemed to favour his idea, at least, the debt must be due when judgment is rendered ; but before due the mortgagee enters at common law. See post.

The objection made to the adoption here of the English principle, to wit : that a mortgagee has a right to enter or to sue out his mortgage as soon as made, is on the ground that the mortgagor's three years' redemption may be gone before the debt becomes due. As if A makes a mortgage to B, upon condition, that if A pay B \$1000 in five years, the deed shall be void ; now it is said, if B can enter immediately, A's three years' redemption will expire two years before the pay day. But the true answer, and which has been given, is, that if the

CH. 112. mortgagee enter before the pay-day, and so before the condition broken, he enters at common law, and not for condition broken; and that the three years do not begin to run till he enters or gives notice he is in for condition broken. And when we examine our mortgages and pleadings on them, it must appear that our mortgage deed, acknowledged and recorded, vests the mortgaged estate immediately in the mortgagee; for by such deed the estate is expressly granted, sold, and conveyed to him for a consideration paid, but on a condition subsequent to be void on the condition's being performed. And as it has been decided, that the recording, where the grantor has right and authority to convey, "supplies the want of livery of seizin," the estate by such deed must be vested in the mortgagee. And so invariably are, and have been, our pleadings; for always in declaring on such mortgage deed we state its execution and record, if recorded, and say, thereby the mortgagor conveyed to the mortgagee the estate, to hold &c. by force whereof he became seized. This mode of declaring is supported by the spirit and principles of the contract.

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§ 5. The mortgagor may alien in fee, where he had an estate in fee, and his grantee may redeem; and by our act of 1799, the mortgagor or vendor, "or other person lawfully claiming under" him, may redeem. The money is to be tendered to the executor or administrator, and if none, to the heir, and if no heirs, on the land. The assignee of the mortgagee is in the place of the mortgagee. Only the sum due on the same mortgage can be considered. Every mortgage by our law stands solely by itself. The mortgagee before foreclosure has no power to incumber the estate; any lease he makes is liable to be avoided by the mortgagor's redeeming. 9 Mod. 1, *Hungerford v. Clay*. A mortgagee in fee, at law may commit waste, but not in equity. 2 Vern. 392, *Hanson v. Derby*. Hence, if he cut down trees &c. chancery will decree an account, and grant an injunction to prevent any more being cut, and at law the trees must be applied towards the debt, and he is entitled to all expenses incurred in necessary repairs. 3 Atk. 313. If the mortgagor commit waste, chancery will grant an injunction. 3 Atk. 323. See a. 2, s. 20.

§ 6. Wherever the covenant is with the mortgagor personally, and runs not with the land, see *Stokes v. Russel*, ante; also, where he may have an action of covenant as to repairs &c. after his interest in the land is extinct.

2 Burr. 831.

§ 7. As to mortgages of ships at sea; see *Lien*, Ch. 44; Ch. 32; Ch. 33. And where goods are mortgaged, possession must be delivered, especially if the deed be absolute.

Hob. 3, *Yong v. Radford*.

§ 8. The redemption of a term survives as the term itself would. Here the wife's lease was mortgaged by the husband,

and he survived, and held he might redeem when he paid the money at the day, and if he died, his executrix might redeem, and not the administrator of the wife. Therefore, where A, a *feme sole*, had a leasehold estate for thirty-one years, and married B, and they both mortgaged it to C for £22, and before the day of payment she died; at the day the husband paid the money, redeemed the estate and entered, and made D, his second wife, executrix, and then E administered on the estate of the first wife and entered; the court held, the estate vested in the husband and passed by his will, for by his marriage he had power to alien it, and if he survived, to hold it. Here he survived, and the condition of redemption survived to him as the term would have done; and if he die first, it survives to the wife, unless he disposes of it: and 2. If husband and wife join in a mortgage of her term like this, it is no disposition of it, and if he buy the fee the term is not extinct.

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Art. 2.

The mortgagor cannot commit waste, 2 Cruise, 108.

§ 9. Though as between the parties the mortgagee has an estate vested by the mortgage; yet he has none before entry of the rights, nor is he subject to any of the duties of possessor; hence, not as to covenants that run with the land as was stated in a former chapter. As to third persons, the mortgagor while he remains in possession is owner. He alone can claim the freight of a ship while he remains in possession, and he, and not the mortgagee, is liable to necessities provided for the ship. As to future advances, see Ch. 32, a. 4, s. 12, a. 10, s. 9.

Imp. M. P. 280.—7 D. & E. 306, *Wistardel v. Dale*.

§ 10. *The mortgagor remaining in possession gains a settlement.* As where the pauper's father mortgaged several houses to Elijah Morey, and on his death his right to redeem them came to the pauper; Morey assigned to Ayles, and he in 1788 brought ejectment against the pauper &c. to get possession, the pauper &c. attorned to Ayles. In January 1789, the pauper asked leave of Ayles to live in one of the houses, then not tenanted, for the purpose of overlooking some repairs, which he proposed to make on the estate with an intention to sell it and pay the mortgage money. On having leave, he went into one of the houses, and there remained three months, when he was removed as a pauper; he did nothing as to repairs or redemption, nor was any agreement made about rent. The court decided that he gained no settlement, because he was not in possession as mortgagor, but only for a particular purpose, by the special leave of the mortgagee; but all agreed that he had gained a settlement had he been in possession as mortgagor. (Not now law in England to postpone the first mortgagee if he witness a second &c.)

3 D. & E. 774, *King v. Inhabitants of Catherington*.

Mortgagor viewed as owner while in possession. 1 H. Bl. 114, 117.

A mortgagor has no power to lease, and if his lessee enter, he is a trespasser. 2 Cruise, 108.—6 Ves. jr. 190.—5 Bac. Am. ed. 47.

ART. 2. *The mortgagor's equity of redemption.* § 1. This

3 Bac. Abr. 649, 650.—Ca. Abr. 595.

2 Salk. 450, *Cope v. Cope*.—Vernon, 37, 211.—2 Vent. 364.—2 Eq.

CH. 112. is said to be but a *chose in action*; but is transferrable by Art. 2. modern practice, and descends to his heirs. He who purchases the estate or right of the mortgagor may redeem; so may his devisee; but each takes the estate *cum onere*, and in England neither the purchaser nor devisee has the benefit of the personal estate. Hard. 511; 1 P. W. 268; 2 Atk. 494; 4 Brown's Par. Ca. 142.

3 Salk. 64,  
Hutton v.  
Mansel, and  
161.—7 Ves.  
jr. 273.—  
2 Cruise, 109,  
Keech v.  
Hall.—1 Ch.  
Ca. 71.

§ 2. In this case it was adjudged, that if the husband and wife mortgage her lands, and she die first, he may redeem, and not her administrator; but if the husband die first, she shall redeem, and not his executor. It is also said an executor having assets is compellable to redeem, and if he do not, he is guilty of waste, and liable to answer for the value of the equity of redemption. Assignees of a bankrupt or tenant may redeem. Dougl. 22.

2 Cruise, 84,  
86, 126,  
126.—Vern.  
488, Willet v.  
Wenell, cit-  
ed 3 Bac.  
Abr. 634.—  
This right  
cannot be  
restrained.  
2 Cruise, 89.

§ 3. *The law favours redemption.* Hence the maxim is, once a mortgage always a mortgage, in equity. As where A borrowed £200 of B, and mortgaged lands to B worth £15 a year, B at the same time gave a bond to A, conditioned that if the £200 and interest were not paid within a year, then B, the mortgagee, his executors, or administrators, to pay A a further sum of £78 in full, for the purchase of the premises, A died within the year, and B paid the £78 to A's administrator the next day after the mortgage was forfeited; yet the court held, that A's heir might redeem, paying the £200 and interest, also repaying the £78.

2 Vern. 84,  
Marlove v.  
Ball, cited 3  
Bac. Abr.  
634.—1 Ch.  
R. 222.

§ 4. So where A received £550 of B, and made to him an absolute assignment of a church-lease for three lives, and B by writing under his hand agreed, that if A paid £600 at the end of the year, he, B, would reconvey; B died, leaving C, his son and heir, two of the lives died, and B and C had twice renewed the lease, yet though it was near twenty years since the conveyance was made, a redemption was directed, paying the £550 &c. Here the assignment was absolute and under seal, and the defeasance, so far as there was any, was only in writing not under seal; still, however, A was allowed a right in equity to redeem, and this writing to have the effect of a valid defeasance. How far our courts in this State, settling a case in equity, and deciding "according to equity and good conscience," ought to admit a writing to be a defeasance to a deed, has not been fully decided.

§ 5. Our act of June 1802, cited Ch. 108, a. 5, speaks of "any bond, or other deed, or instrument of defeasance." As *bond or other deed* includes all kinds of deeds, what can be meant by *instrument of defeasance*, if not some instrument *not a deed*? And it has been asked, how far the rule, *unumquodque dissolvi eo ligamine quo ligatur*, strictly holds in equity.

The statute of frauds only requires a writing. It is clear a writing not under seal, at law, is not a defeasance to a deed ; and perhaps it is a fair construction of our statutes to hold the equitable powers of our court only extend to the penalty or forfeiture, to chancer that and not to the obligation of the contract. And if the mortgagee, with power to sell the estate, sells, with notice to the buyer of the right to redeem the mortgagor has, he may redeem. Comyn's R. 603, 612, Croft v. Powell & al. In the sale the defeasance making a mortgage was mentioned. 2 Cruise, 94, 95.

§ 6. So an estate of £200 a year was conveyed to A for £250, A applied to have a foreclosure, and dropt his suit, and the court held it to be a mortgage. In this case the sole evidence of a mortgage was, the grantee's applying to foreclose ; this after act was a confession of a mortgage, deemed proof sufficient. So if a conveyance be absolute, but the vendee agrees in writing, under hand and seal, to accept his money within a year, the estate shall be redeemable.

§ 7. *Principles of interest in redeeming mortgages.* As where a mortgagee assigns, all the mortgage money really paid by the assignee, due at the time of assignment, becomes principal as to the mortgagor whenever he comes to redeem. This is settled in chancery. But the mortgagor is not concluded by the account signed by the mortgagee and assignee. If the mortgagor, by his signature, acknowledge so much due for interest, this will not carry interest unless under his hand he agree to make it principal. And "it is a rule that a mortgagee of a mortgage forfeited, shall have interest for his interest, and shall be accountable only for what profits he has received, not for what he might have received, except there were fraud ; and it was always the rule, that the mortgagee assigning the assignee shall have interest for the interest then due." 1 P. W. 376, 453, 478, 480 : Mosely, 27, 247.

§ 8. These are rules in equity in England, and as a mortgagor in this State, must settle his account when he comes to redeem on a bill in equity, it seems to be reasonable that our court setting in equity, at least as to the sum to be paid, should adopt the same rules. But it is said that if a mortgagor insert a covenant in a mortgage, that if the interest be not paid at the day, it shall draw interest, chancery will relieve against this as fraudulent, because unjust an oppressive ; but if interest has become due, then his agreement, it bear interest, is good. But *quære* of the covenant so inserted ; for by the last clause it is clearly just interest in arrear may draw interest ; and how can it be material, in point of real right and justice, on which chancery professes to proceed, whether this interest be agreed to at one time or another,—before it accrues,

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2 Com. D.  
635, cites 1  
Ch. Rep. 222.  
—2 Vern. 84.  
—2 Com. D.  
635.

1 Eq. Ca. Abr.  
328.—2 Do.  
530.—3 Salk.  
241.—5  
Wood's Con.  
548, 549.—7  
Ves. jr. 273.  
—3 Bro. Par.  
Ca. 68.—8  
Vern. 135.—  
1 Vern. 168.  
—Chan. Ca.  
67, 68, 258,  
287.—2 Ch.  
R. 86.—3 Atk.  
271.—3 Atk.  
722.

Anstr. 525.—  
2 Ves. 678.—  
2 Cruise, 190,  
&c.

3 Atk. 331,  
520.—Salk.  
449, Ld. Os-  
sulston v. Ld.  
Yarmouth, in  
chancery.—3  
Bro. Par. Ca.  
68.—2 Vern.  
316, Strode  
v. Parker.

**CH. 116.** or after. So illegal if more than legal interest be such penalty; but if the mortgagor covenant to pay six per cent in England, if he fail to pay, &c. chancery will not relieve, as it is the parties' agreement. 2 Vern. 134, *Halifax v. Higgins*.

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1 Eq. Ca.  
328.—2 Vern.  
289.

§ 9. The mortgagee is accountable for the rents and profits, if he assign to one insolvent, and the case seems to be stronger against the mortgagee if he permit one insolvent to receive and dispose of them, as the receipt of his tenant is his own receipt of them. And when the mortgagee is in possession, the true rule seems to be, that he must use due diligence to make the best of the rents and profits, and if he do not, he will be answerable on the ground of negligence; for as these are received by him to be accounted for to others, he is, in fact, as a bailiff to them; and every man who puts himself in a situation to be accountable for property to others, puts himself in a situation to be holden to use due care and diligence in regard to it.

4 Johns. R.  
216, 222,  
Jackson v.  
Dubois.—4  
Dall. 151.—2  
Cruise, 207,  
208, 209.—6  
Johns. R. 290,  
296.—See  
s. 24.

Mortgagee's estate cannot be sold on execution till the equity of redemption is foreclosed. See *Jackson v. Willard*. Yet he may in ejectment recover against the mortgagor, and those claiming under him. Also held, the registry of the mortgage is notice to all the world; hence the mortgagee's interest is not affected by his silence, or bidding off the estate at a sheriff's sale, without mentioning his mortgage, or by a sale on a judgment after the registry. The mortgagor is deemed seized, and the legal owner of the land, as to all except the mortgagee. See *Hitchcock v. Harrington*. May sell a part to pay the mortgage 2 Johns. R. 510.

4 Dall. 146.  
—1 D. & E.  
763, Wil-  
loughby v.  
Willoughby.

A purchaser having notice of a mortgage is bound by it, though never recorded; and the registry is notice to after purchasers, 1 Johns. Ch. R. 394; for the sum in it, 299. So if an after purchaser or mortgagee has notice of a former purchase or incumbrance, he shall not avail himself of an assignment of an old outstanding term, prior to both, in order to get a preference. 2 Cruise, 217 to 230; see a. 5, s. 9.

1 Vern. 187,  
Edmunds v.  
Povey.—2  
Cruise, 210,  
Gordon v.  
Graham.

But if first, second, and third mortgagees and lenders of monies, without notice, and the third hearing of the two former, bought in the first, a satisfied judgment; and his demands were preferred in equity to the second. *Sadler v. Bush*, 2 Vern. 30. So if A lends money to B, on mortgage, with a clause inserted by which the land is to be security for any further sum to be added, such after loan is viewed as a part of the original transaction, and has priority over a mesne loan.

*Belcher v.  
Renforth.*—  
A debt con-  
tracted in N.  
Connecticut, 2

The principles of these and similar cases may apply in some parts of the United States, adopting the English practice, and York bears N. York interest, though secured by a mortgage of land in Connecticut, 2 Day's Ca. 363, *Bulkley v. Bulkley*.

in all so far as they were decided on the grounds of fraud : this ground of fraud is well stated in *Belcher v. Renforth*, 5 Bro. Parl. Ca. 292, cited 2 Cruise, 238 to 244. As where A, seized in fee, mortgaged to five successive persons ; on his death the second mortgagee filed his bill in equity against the other four for a sale of the mortgaged premises, and to pay the mortgages in their just order ; the four answered &c., and the fifth prayed the same ; afterwards, *pendente lite*, he purchased the interest of the first mortgagee, and filed a cross bill stating this matter, (as held he might,) and claimed the legal estate as vested in him by such assignment, and argued that he was entitled to payment not only of the first, but also of his fifth mortgage, preferably to any of the intervening mortgages, and so decreed. On an appeal to the House of Lords, the decree was confirmed, though much opposed. And for the confirmation it was urged, that it is a settled rule in equity that a third mortgagee having lent his money without knowing of the second mortgage, may buy in the first, hold the mortgage premises against the second mortgagee, till paid his first and third mortgages, and so held for a century ; hence when the second mortgagee lent his money he knew this might be the course of things, and so the third ; that the first decision was on this ground, to wit, the third mortgagee having innocently lent his money, not knowing of the second mortgage, has as good a right in conscience to be paid as the second mortgagee has, and having by the assignment an absolute title at law, and possessing the title deeds, without which the estate cannot be bought or sold, a court of conscience ought not to take from him legal protection of an honest debt ; and because the second mortgagee was negligent in not taking into his hands the title deeds, and because by leaving them with the mortgagor he was enabled to practise fraud against innocent lenders, and so the second mortgagee was a party to the fraud.

§ 10. The English doctrine which occupies so many pages in the English books, that consists in tacking one mortgage to another, does not hold in New England, New York, Pennsylvania, if in any of our States. As every mortgage deed must be recorded, it is notice, when recorded, to all the world. Hence registered mortgages must usually be paid according to the order of the dates of the registries. And each mortgage holds only for the principal, interest, and costs, due on that very mortgage. A mortgage not recorded is good between the parties. The registry is only to protect after purchasers. 1 Dall. 434, *Levinz v. Will* ; 2 Johns. R. 595 ; 9 Ves. jun. 407, *Jones v. Gibbons*. And as the registry of a mortgage is notice to every one, it can be no implication against a prior

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1 Cain. Er.  
112, *Grant v.*  
Bank of the  
U. States.—1  
Bin. 131,  
*Clute v. Rob-*  
*inson*.—4  
Dall. 153,  
*Stroud v. Loc-*  
*kart & al.*—  
Ch. 109, a.  
10, s. 4.

CH. 112. mortgagee if he witness a subsequent mortgage of the same estate, and is silent, as the registry shews his mortgage title ; but if one be not recorded, but a subsequent mortgagee has notice of it, he is bound by it. This principle applies to our deeds generally, and has been already considered.

Harrison v. Forth, Prec. Ch. 51.—1 Atk. 571 —2 Atk. 139, 242, Lowther v. Carlton.—2 Bro. R. Ch. 66, Sweet v. Southcote.—2 Lev. 106.

§ 11. Knowing of a prior mortgage, I am bound by it, though not recorded when I take a second ; yet if I assign my second mortgage to B, and he to C, and neither has notice of the first, the first is not valid against C, and it seems not against B, for B and C are innocent purchasers, without notice, and for valuable considerations, and the prior mortgagee ought to have had his mortgage recorded ; but if C had notice, and B not, C may strengthen his title under B, and therefore B shall be made party with C in equity, and it was said it was like the case at law of warranty &c., where one deft. is allowed to pray in aid the evidence of another deft., who has an interest in the thing contested. Cowper, 712 ; Strange, 664 ; Ambl. R. 624 ; 2 Vern. 599 ; 3 Atk. 646 ; 1 Ves. 67 ; 3 Ves. jun. 486 ; 1 Eq. Ca. Abr. 331. Whether the immediate party has notice or not, he claims under him or those who have title for want of notice. White v. Stringer, 4 Munf. 313.

For. 187, Newport's case.—Holt, 477.—A buys fraudulently, B buys fairly of A, B's title is good, as above.

§ 12. On this principle a mortgage was made by Kin, 1659, by divers mesne assignments vested in N ; no evidence that any money was paid, and so said to be fraudulent in its creation ; and hence, though N paid a valuable consideration, yet this would not purge the fraud, and make it good against one who was a purchaser *bonâ fide* and for a valuable consideration : But held, it was good. And Holt C. J. said, it was good between the parties, and being so when the first mortgagee assigns for a valuable consideration, it is the same as if the first mortgage was for a valuable consideration, for then the second mortgagee stands in the first place ; so within the 27th El. c. 4, which provides, " that no mortgage *bonâ fide* and on good consideration, should be impeached by force of this act, but it should stand in such force as before the act made." This provision extends to this case.

The tacking of one mortgage and debt to another, in England, is not on uniform principles. As against the heir a very slight equity in the mortgagee is sufficient, but as against a purchaser of the equity of redemption, so to tack, the mortgagee must have a legal lien &c. Ambl. R. 685 ; 2 P. W. 777 ; 2 Vern. 177, 281, 691 ; 2 Ch. R. 247 ; Ch. Ca. 97 ; 3 Brown's Ch. R. 162 ; 2 Atk. 52 ; 6 Ves. jr. 226 ; 3 Salk. 240 ; 3 Atk. 630 ; and many other cases.

1 Vern. 476, Williams v. Springfield.—5 Ves. jr. 610, 620, Bromley v. Holland.—1 Vern. 49, Darcy v. Hall.—2 Atk. 54.

§ 13. As a mortgage is assignable, a purchaser shall hold it against the mortgagor, or his heirs, for the sum due on it,

though he bought it for less than was due on it, or for less than it was worth : for he stands in the mortgagee's place who assigned it, and who might have given it *gratis* ; and it might have been also worth less than the sum given, and he who hazard's a loss, if it happen, ought to have the benefit, if a benefit arise. 3 Ch. R. 23. But if the heir of the mortgagee buys in mortgages, he shall be allowed no more than he gives or pays, as against fair creditors ; 1 Eq. Ca. Abr. 330 ; 1 Salk. 155 ; 6 Ves. jr. 625 : and if no creditors, then as against legatees and those entitled to the surplus ; 8 Ves. jr. 346 ; 2 Cruise, 213, 214.

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§ 14. A mortgaged to B, and died ; B bought the dower of A's wife ; decreed A's heir should have the benefit of it, on the principle the mortgagee is trustee for the mortgagor after his money paid. And so if a guardian compounds debts, it is in chancery for the benefit of the ward ; the presumption is, he compounds with the minor's money. See 2 Vern. 471.

3 P. W. 251,  
Powell v.  
Glover.—  
Baldwin v.  
Banister.

§ 15. Decreed that the heir or other person should not, as against a real purchaser, be allowed more on any incumbrance bought in, than what he paid for it, not regarding what was really due on it. See 1 Vern. 335.

1 Vern. 464,  
Clifton v.  
Long.

§ 16. If the land mortgaged be devised by the mortgagor, the bill to foreclose must be against the devisees and not the executors of the mortgagor, as the devisees are entitled to the estate. And if the parties to the mortgage agree, in case the debt is unpaid, the mortgagee may sell, (and no proof of fraud,) he is accountable but for the surplus of the price above the debt to the mortgagor, and interest on such surplus till payment ; but not for profits, except he received them before the sale ; nor for the value of the property at any after time. After interest was reduced by statute, in England, from eight to six per cent., the mortgagor continued to pay eight as before : Held, he should be allowed for the two per cent. in a final adjustment ; but if principal and interest were overpaid, there should be no refunding. But the statute of Anne has no such retrospective effect. 1 Eq. Ca. Abr. 288. It seems there shall be no interest on interest on a mortgage, unless there be some writing signed to that effect, the estate in the land being to be charged with it. 1 Vent. 366 ; 2 Vern. 135. No interest after a legal tender of the debt, 2 Ch. Ca. 206 : and a tender of a bank bill, offering to turn it into money, to one of four executors, who afterwards proved the will was deemed a good tender. Eq. Ca. Abr. 318, 319. The tender must be by one who is interested, and to the person of the mortgagee, except where a time and place are appointed. Cro. E. 132 ; Co. L. 211 ; 2 P. W. 378.

2 Hen. & M.  
6, Graham's  
exrs v. Car-  
ter.—1 Wash.  
125.—1 Hen.  
& M. 29,  
Moore's exrs.  
v. exrs. of  
Aylett.—2  
Vern. 165.—  
Prec. Ch. 50,  
Walker v.  
Penrin.—1 P.  
W. 652.—Ch.  
Ca. 29, Aus-  
tin v. Dodwell.  
—Gyles v.  
Hall.

CH. 112. § 17. *Restraints to redeem void; secus an agreement to purchase; secus a conditional purchase.* Equity allows no restraints on the right to redeem, on the ground they are terms extorted from the borrower's necessities, and tending to usury and oppression. Once a mortgage always one, is the settled rule. See s. 3, 4. As a *proviso* to redeem during the mortgagor's life only is void, so if the redemption be confined to the mortgagor himself or to the heirs of his body, such restraint is void. 1 Vern. 33, 190, *Howard v. Harris*; *Exton v. Graves*, 1 Vern. 138.

2 Cruise, 96  
&c.

*Cottrel v.*  
*Purchase,*  
2 Eq. Ca.  
Abr. 595.—  
2 Vent. 366,  
*Bonham v.*  
*Newcomb.*

1 P. W. 268.  
*Floyer v. Liv-*  
*ington.*

§ 18. *A new agreement to purchase after a mortgage is made*, on a new consideration, is valid, though there be a subsequent declaration, that the mortgagor may have his estate, on paying principal, interest, and costs. So if there be a release of the equity of redemption on like declarations made. In these cases equity directs no re-purchase, but on strict performance of the conditions stipulated. So if money be lent to a relation, provided if not re-paid at a certain day, the land to be settled in a special manner named, for the benefit of the family, equity will not decree a redemption.

§ 19. *Conditional purchases*, defeasible in a limited time, and interest received as rent. Here the terms must be strictly adhered to, or the grantee's estate will be absolute. 2 Atk. 494, *Mellor v. Lees*; 4 Bro. Parl. Ca. 142, *Tasburgh v. Ecklin*.

2 Cruise, 111,  
112, &c.—  
See art. 1, s.  
6, 6, art. 2, s.  
7, 8, 9.—2  
Burr. 969—  
Douglass. 455.

§ 20. *How a mortgagee must account.* "As soon as the conveyance in mortgage is executed, he becomes seized and possessed of the legal estate, and may enter into possession, unless prevented by the express terms of the contract;" but in equity the lands are but as pledge in his hands, and he is the mortgagor's trustee while he has a right to redeem; and if the interest be not paid, the mortgagee may give notice to the tenant, and claim the rent due, and also accruing afterwards. See *Moss v. Gallimore*, a. 1, s. 2, &c. Nor is he subject to covenants in a lease assigned to him till he enters. See *Eaton v. Jaques*, ch. 105, a. 6; *Smith v. Sparks*, 2 Vern. 275. Nor till entry can he claim the benefit of covenants &c. This being the situation of the mortgagee, on general principles he must account accordingly. When he enters after forfeiture, he "is a bailiff or steward to the mortgagor, and is subject to account with him for the rent and profits of the estate." 2 Cruise, 47. A mortgagee in possession however is not accountable according to the value of the lands, (a. 1, s. 5,) unless provided he in fact makes so much, or might have done so, but "for his own wilful default;" as if he turned out a sufficient tenant, who held at so much rent, or refused to accept a good one, who would give it. It is the mortgagor'

2 Cruise, 117,  
118, &c.

1 Vern. 45.—  
2 Atk. 534.

fault the mortgagee enters, and when in possession he is only a bailiff for what he actually receives, and is not bound to the trouble and pains to make the most of another's property:— Is "entitled to such expenses as he is put to in preserving the estate, and may add them to the principal of the debt, for which he will be allowed interest." But if he enter and keep out other creditors, and yet allows the mortgagor to receive the rents and profits, he is chargeable with all the profits he *might* have made after entry. So if he permit the mortgagor to make use of his incumbrance in keeping out other creditors, he is accountable for the profits from the time they were entitled to their remedy. If the mortgagee in possession assign without the mortgagor's consent he is accountable for the profits; if to one insolvent, it is a breach of trust;—is not allowed any thing for his trouble in receiving the rents of the estate himself, but is paid what he pays an agent he is obliged to employ; and if the mortgagor agree to pay the mortgagee for such trouble, equity will not enforce the agreement. When the mortgage has slept nineteen years, the law presumes it paid &c. 10 Johns. R. 381.

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2 Cruise, 118,  
119, &c.

And 1 Vern.  
267, Chap-  
man v. Tan-  
ner.—3 Atk.  
518.

2 Atk. 120,  
534.

§ 21. *Equity of redemption* continued, see s. 1, 2, &c. This equity may be not only devised &c. as above, but may be mortgaged:—is subject to curtesy, but not to dower, on a mortgage in fee, on the ground an equity of redemption is like a trust estate; as where A, seized of a large estate, mortgaged the same in fee, previous to his marriage with the plt. and died; held, she could not have dower in it either in law or equity, as the seizin in fact was not in him, but in the mortgagee during her coverture; and though it could be proved her husband understood and declared that she would be entitled to dower. So neither the widow of the trustee nor *cestui que trust* can have dower in such an equity of redemption. In *Bank v Sutton* the master of the Rolls decided otherwise; but in the *Attorney General v. Scott* the decision was as in *Dixon v. Saville*. But if the husband mortgages for years, marries, and dies, his widow has dower in the equity &c., for in such case he remains seized during the marriage; but if not paid, she pays a third of interest and principal.—Is assets in equity but not at law in England in all cases. 2 Cruise, 139, 140. All who derive an interest from the mortgagor by descent or purchase may redeem, and an equity of redemption descends as the estate would. *Griswold v. Marsham*, 2 Ch. Ca. 170. A jointress or tenant by the curtesy may redeem. If A mortgage land to B for \$400, and afterward borrow \$400 more and give B his bond, A's heir or executor cannot redeem without paying both in equity, as the debts become the heir's own &c. and to prevent circuity of action; but as the

1 Atk. 608.—  
2 Cruise, 126,  
128, 129,  
Cashborne v.  
Inglic.—2  
Pow. on  
Mort. 37, *Dix-  
on v. Saville*.  
—2 Cruise,  
131 to 139,  
A. D. 1782.

2 P. W. 716.  
—2 Atk. 294,  
440.—2  
Cruise 140 to  
146.—1 Vern.  
244.—2 Ves.  
jr. 276.—2  
Vern. 177.—  
1 P. W. 276.  
—1 Atk. 300.  
—2 Atk. 52.

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second debt is no lien on the land, no other person interested in it will be obliged to pay it on redeeming, except in some cases A's devisee of the land, (see 1 Eq. Ca. Abr. 325,) since the statute made against fraudulent devises, as that puts him in the heir's situation. 1 Ves. 86, 87; 1 Vern. 41. It is a general rule, the real debtor to have equity in redeeming must do equity. 2 Ves. jr. 372; 2 W. Bl. 726; 1 P. W. 775; 3 Atk. 630. No exact time for redemption, 2 Cruise, 152 to 162, in England, but rarely allowed after twenty years; exceptions.

2 Cruise, 165. Though an equity of redemption may be attached and set off, it is indivisible and cannot be divided among the mortgagor's creditors. 2 Day's Ca. 142, Franklin v. Gorham. 2 Cruise, 190, Tory v. Cox. —3 Atk. 620, Nichols v. Maynard.—2 Salk. 440. —Atk. 330, Thornhill v. Evans.—3 Atk. 271, Ashenhurst v. James.

2 Cruise, 192.

Mosely, 246, Neale v. Attorney General.

1 Eq. Ca. Abr. 287.

§ 22. As to the amount of interest and how paid, see s. 7, 8, and 9 this art.; also s. 20. A general rule, the personal estate is first liable even in favour of a devisee, where the testator does not otherwise direct, for the personal estate receives the benefit of the loan; hence a disposition of the personal estate will make no difference, nor a charge on the real estate; and the rule in England holds, as well as to a *hæres factus* as a *hæres natus*;—not very important in this country, as our laws generally make a different arrangement of estates from what those of England do. Assigning the debt does the security in equity. 2 Day's Cas. 425, 474.

Interest is included in every mortgage. It has been often the case, where legal interest has been reserved in the security, to agree, if punctually paid, to receive less, but at a certain rate; this is allowed to be good. But if legal interest be reserved, with a proviso, if in arrear so long after due, it shall be raised above legal interest, say half per cent. and it is so in arrear, equity will not allow the mortgagee to recover the additional part, as it was in the nature of a penalty, hence relievable in equity. Interest upon interest is not generally allowed;—equity relieved a mortgagor, compelled by the mortgagee to agree that interest be turned into principal at the end of every six months. Exceptions to this general rule: 1. If the mortgagee, with the mortgagor's consent, assign over, all paid by the assignee draws interest: 2 Where there is a stated account, it carries interest, as the debtor impliedly engages to pay interest: 3. Where an account is settled by a master, and confirmed by the court, interest is on interest from such confirmation, though a part be on costs: 4. Where the time is enlarged in favour of the mortgagor: 5. On a bill to foreclose, principal, interest, and costs are put into one sum by the master, and if the mortgagor, or an after mortgagee, request longer time to redeem, he must pay interest on the whole: 6. Interest on interest not usually allowed against a minor, except where he receives a benefit; as where thereby he receives the rents to live upon, or some other equivalent, for such interest on interest.

§ 23. *Who is bound to pay interest &c.* Generally a tenant for life is compellable to keep it down; but not a tenant in tail, as his estate may continue forever &c., 3 P. W. 235; and the reversion &c. thereon are very remote; but a minor tenant in tail shall pay interest to the amount of the rents and profits, by his guardian or trustees. 1 Ves. 478; 2 Atk. 416.

Mortgage money is payable to the executor or administrator, as part of the personal estate, though the mortgage be in fee. Parol evidence is admissible to prove the mortgage money paid.

§ 24. *Priority in paying mortgages.* As to the order in which debts are paid in England, there is a great number of distinctions, and many of them affect mortgage debts: hence it is stated in English books, that mortgages are not preferred in equity to judgment debts;—that legal incumbrances are preferred to equitable ones;—that priority is lost by fraud &c. &c.;—also as to *tacking* subsequent to prior incumbrances &c., all which are in a great measure peculiar to the English system, and but few of them known in the United States, and still fewer in New England, yet every where there is a general rule to pay mortgages according to the priority of their respective dates, when on the same estate, "*qui prior est tempore, prior est jure.*" And in the United States, where judgments, recognisances, attachments, and levies are legal liens on it as well as mortgages, all must be satisfied according to priority of dates. So when equitable liens, these follow the legal. Therefore if A have an equitable lien or incumbrance, and B, without notice of it, take a mortgage of the legal estate, he has the priority; and any equitable one excepted has priority over one not excepted, though that be prior in date. So even legal priority may be lost by fraud, by a prior mortgagee's artfully concealing her mortgage, and drawing one in to take an after mortgage on the same estate; and by our law, if B take a mortgage, having notice A has a prior one not recorded, B's is postponed as fraudulent. See principles laid down in *Pasley v. Freeman*, Ch. 62, a. 2, s. 1, and Ch. 32, cases of frauds, and Index, *Frauds, &c.* As our title deeds and mortgages are, by law, recorded, a second mortgagee's having the title deeds is not of much importance. Indeed in England the first mortgagee must knowingly and voluntarily leave them with the mortgagor, and without good reason, to be postponed. In fact to be postponed he must be guilty of fraud or of gross negligence. 1 Eq. Ca. Abr. 320. As to prior defective titles, none but purchasers without notice, can tack. 2 Vent. 337; 2 Cruise, 211, 212. A first mortgagee may tack a judgment, 2 P. W. 694; but a judgment creditor cannot tack. 2 P. W. 491. As to an after mortgagee being in

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2 Cruise, 194,  
196, Chaplin  
v. Chaplin,  
Sarjason v.  
Cruise.  
2 Ch. Ca.  
187, Canning  
v. Hicks.

2 Cruise, 198  
to 249.—1  
Vern. 625.—1  
Eq. Ca. Abr.  
142.  
In New York  
an equity of  
redemption  
may be sold  
under a *fiery  
facias*. 1  
Caines' Ca.  
in E. 47.—  
Ambl. 163,  
Ingram v.  
Felham.

2 Vern. 370,  
Draper v.  
Borlau.—See  
cases, a. 6;  
cases, Ch.  
225, 226.  
—1 D. & E.  
755.—1 Eq.  
Ca. Abr. 321.  
—1 D. & E.  
763.—2  
Cruise, 202.  
6 Ves. Jr. 183.  
—Anst. R.  
432, Marsh v.  
Lee.—See  
art. 2, s. 9.

CH. 112. to protect him against a prior one, an old title, see s. 9, also  
 Art. 3. a. 5, s. 9.

1 Salk. 245,  
 Smartle v.  
 Williams.

ART. 3. *What seizin the mortgagee must have to assign.*

§ 1. J. S. mortgaged lands to A for years, he without the mortgagor's joining, assigned to B; B assigned to C, under whom the plt. in ejectment claimed. The deft. admitted the first mortgagee might well assign without entry, or joining the mortgagor, tenant at will &c. to the mortgagee,—and his possession as such is but the possession of the mortgagee. The deft. objected, that the assignment of the first mortgagee determined the lease at will, and the mortgagor thereby became tenant at sufferance; and that his continuance in possession divested the term, and turned it to a right; so that it could not be assigned without B's entry or joining the mortgagor. Holt C. J. said, that on executing the mortgage deed, the mortgagor by the covenant to enjoy till default of payment, is tenant at will, and the assignments of the mortgagee could only make the mortgagor tenant at sufferance, but his continuing in possession could never make a disseizin, nor a divesting of the term. But it had been otherwise if the mortgagor had died, and his heir had entered; for the heir never was tenant, but his entry would be tortious: or if the mortgagee had entered on the mortgagor and he had re-entered, for the mortgagee's entry had been a determination of his will, and the re-entry of the mortgagor had been merely tortious. But if before the mortgagee or his assignee enters, and permitting the mortgagor to continue in possession, and he dies, and his heir, executor, or administrator continues his possession, willing to give it up whenever the mortgagee or his assignee shall require it, how is this a disseizin or tortious act? It is every day's practice for the mortgagee's assignee to assign &c., so long as the mortgagor or his representative in possession acknowledges the mortgage and claims only a right to redeem; for while on his part there is only possession and this claim, there can be no disseizin.

2 Cruise, 107,  
 122.

2 Salk. 563,  
 Hammond v.  
 Wood.

§ 2. If the land be extended to the conusee of a statute, and yet the conusor remains in possession, it is a disseizin, and turns the conusee's estate to a right, and he cannot assign his interest, as he is disseized. So if a mortgagor remain in possession tortiously, and not by the consent of the mortgagee, there is a disseizin, and the mortgagee cannot assign or convey; but in these cases the conusor's or mortgagor's acts must be such as make a disseizin.

8 D. & E. 645.  
 —Cowp. 600,  
 Goodtitle v.  
 Baily.—1 Ld.  
 Raym. 36,  
 Atkins v. Up-  
 ton.

§ 3. In this action a mortgagee was admitted by the court to defend in ejectment with the mortgagor. The mortgagor never can dispute the title of the mortgagee, where the deed of mortgage is not disputed. As the mortgagor's making the

deed to the mortgagee admits his title, a mortgagor's covenant for further assurance does not oblige him to release his right to redeem. CH. 112.  
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*Mortgagor's entry where legal or not.* It was held in this case, that where the conusee was to be allowed for his reasonable expenses, labour, &c. as well as his debt,—as so he had an uncertain interest in the land, and it was uncertain when his debt was paid, the conusor could not enter upon the land, but was obliged to sue his *scire facias*. This notion of uncertainty applies to our mortgages; for our mortgagee in possession may expend in repairs and improvements even more than the rents and profits, and so have a just demand beyond his debt and interest, and uncertain how much; hence, our mortgagor can never enter upon our mortgagee in possession, but must take his process on a bill in equity in order to get into possession. 4 Co. 67, Fulwood's case.

§ 4. But in *elegit*, the debtor as a mortgagor, may enter after the debt is paid, for that is a certain sum ascertained by judgment of court, and the judgment creditor holds the lands only for that debt. The same rule seems to apply to our cases when an equity of redemption is sold at auction, in some degree. In these cases the mortgagor debtor pays the sum bid and interest, and such sum as the purchaser pays the mortgagee and interest, deducting the rents and profits the purchaser may receive, over and above the repairs and betterments. Here it appears these cannot exceed those; still, however, there may be some uncertainty; therefore, by our law it is questionable if a person having a right to redeem, and regain possession of his estate, can enter but by legal process, unless he pays or tenders the full demand of the purchaser at auction in possession; then pretty clearly his case is that of the *elegit*, for then there is no uncertainty or dispute about the sum to be paid, where he tenders all the person in possession demands.

§ 5. Though the assignee buy a mortgage at a discount, he recovers the whole debt of the mortgagor in England, in equity,—but only what he pays against a subsequent incumbrance; but no case is recollected in this State, of an after mortgagee's having any such advantage, and it may well be doubted if by our law he can be entitled to it. The mortgagor being a mere tenant at will, at most, if he lease the estate after mortgaged, the mortgagee may treat the lessee as a wrongdoer or not at his election. Cro. J. 660; Cro. Car. 303. And if he allow the lessee to enjoy his lease, the mortgagor may be viewed as a receiver of the rent, or as trustee to the mortgagee, who may at any time countermand &c. and notify the tenant to pay the mortgagee. 1 Atk. 606. 1 Equity Cases Abr. 329, 330.

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ART. 4. *Massachusetts statutes as to mortgages.*

## Art. 4.

Mass. Act,  
1697, revised,  
March 10,  
1794.

§ 1. By this act of 1697, partly cited in Ch. 108, it was enacted, "that any mortgagee of any lands or tenements, his heirs, executors, or administrators," having received payment, shall "at the request of the mortgagor, his heirs, executors, or administrators," acknowledge just satisfaction to be entered in the margin of the record of the mortgage deed and sign the same, and this shall forever defeat, release, and discharge the same, and bar all actions &c., and if the mortgagee did not in ten days after such request, and his reasonable charges tendered, repair to the register's office and sign such discharge, or otherwise release the mortgage by deed acknowledged, he was made "liable to make good all damages for want of such discharge or release," to be recovered in an action in any court of record, and on judgment against him to pay treble costs. This act in 1784 was revised nearly *verbatim*, adding that the action should be an action of the case.

Mass. Act,  
1691, 1692,  
1698, 1712.—  
2 M. L. 985,  
996.

§ 2. By an act passed in 1698 it was enacted, "that in all cases where any mortgagee or vendee of any houses or lands, granted on condition, hath recovered or entered into and taken possession of the same for the condition broken, the mortgagor or vendor, or his heirs, tendering payment of the original debt or damages, or such part thereof as was remaining unpaid at the time of the entry, with reasonable costs and allowance for any disbursements afterwards laid out on such housing or lands for the advancement and bettering of the same, over and above what the rents, profits, and improvements thereof made, shall amount unto upon a just computation thereof by the court, as on hearing of the parties shall be made to appear, the mortgagee or vendee, or his heirs, or the present tenant in possession (being the purchaser and holding in his own right) shall be obliged to accept such payment, and to restore and deliver possession of the estate unto the mortgagor or vendor, or his heirs, and seal, execute, and acknowledge a good and sufficient deed in the law of release and quitclaim to the same: but in case of his not appearing in court, or refusal to accept such payment tendered, the whole of the said monies which the court shall enter up judgment for, being left in custody of the court, on behalf, and for the use of the mortgagee or vendee, his heirs or assigns, judgment shall be rendered up for the mortgagor or vendor or his heirs, to recover possession of such houses or lands and execution to be accordingly awarded:" 2. "That at any time hereafter where the mortgagee or vendee shall be in actual possession of any estate granted on condition, it shall be in the liberty of the mortgagor or vendor, or his heirs, to bring his suit, in manner

aforesaid, for redemption thereof, within the space of three years next after the term therein expired, and not afterwards." Ch. 112.  
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§ 3. By an act passed in 1712, the above three years were limited to, and to be reckoned from, the time the mortgagee entered into and took "possession of such forfeited estate." Act 1712.  
This was any fair and legal entry into the mortgaged premises.

§ 4. By this act of 1785, for "giving remedies in equity," the above acts were revised with some alterations. The act of 1785 provided, "that in all causes brought before the Supreme Judicial Court of this Commonwealth, or before any Court of Common Pleas, to recover the forfeiture annexed to any articles of agreement, covenant, contract, or charter-party, bond, obligation, or other specialty, or for forfeiture of real estate, on condition by deed of mortgage, or bargain and sale with defeasance, when the forfeiture or breach, or non-performance shall be found by jury, by the default or the confession of the deft. or upon demurrer, the court before which the action is, shall make up judgment therein for the plt. to recover so much as is due according to equity and good conscience," and so conditionally, according to that part of the act cited Ch. 108. Act Nov. 4,  
1785.—Mass.  
Laws, 251.  
A like section  
in the Act of  
Congress,  
Sept. 24,  
1789, s. 26.—  
Maine Act,  
ch. 39, pp.  
123, 127.

§ 5. It will be observed, that by the act of 1698, the three years commenced from any fair and legal entry made by the mortgagee &c. ; but by this act of Nov. 4, 1785, not till possession actually taken by process of law, or by open and peaceable entry, made in the presence of two witnesses. These rules of the law of 1785 continued till March 1, 1799, when it is understood the law of 1698 and 1712 were restored in regard to the three years, as below. Act 1698, &c.  
See Ch. 108.

§ 6. This act is in addition to the said act giving remedies in equity ; and enacts, "that where any mortgagee or vendee claiming any lands or tenements granted upon condition, by force of any deed of mortgage or bargain and sale with defeasance, or any person claiming or holding under them, have lawfully entered and obtained," or shall lawfully enter and get possession, according to the part of this act stated Ch. 108, a. 5, s. 14. Mass. Act,  
March 1,  
1799.

The act follows in substance that of 1698, in providing, that "upon payment, or tendering of payment, of the original debt and damages, with lawful interest and costs, or performing or tendering performance of such other condition as the case may require, or such part thereof as was remaining unpaid or unperformed at the time of such entry, together with such further reasonable sums as may have been disbursed and expended in necessary repairs of fences and buildings, and for the advancing and bettering such estate, over and above what the rents and profits thereof, upon a just computation, shall amount to, to such mortgagee, vendee, or person lawful- By act of  
Feb. 18,  
1819, the  
courts may  
call in new  
parties.

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ly claiming and holding under them, and in possession as aforesaid, within the time aforesaid, such mortgagee, vendee, or other person claiming and in possession as aforesaid, to whom such tender has been or shall be made, shall be obliged to accept such payment, or other performance of the condition, and thereupon to restore and deliver possession of such estate, and seal, execute, acknowledge, and deliver, a good and sufficient deed in the law, of release and quit-claim, and all his right therein, to the persons making such tender, having lawful right to redeem the same: and if on payment, or tendering of payment, performing, or tendering of performance, as aforesaid, such mortgagee, vendee, or person, lawfully claiming or holding them, and in possession, as aforesaid, doth or shall refuse or neglect to deliver possession, and release his right in such estate as aforesaid, such mortgagor, vendor, or other person lawfully claiming as aforesaid, may have his bill in equity, originally triable in the Supreme Judicial Court or Court of Common Pleas, in the county where the estate lies, and shall insert the same in a writ of attachment or original summons, returnable to the court whose seal it shall bear, and shall cause such writ to be served on the adverse party, as other writs of attachment, or original summons, are by law to be served." (Is merely to restore to the mortgagor &c. possession. 6 Mass. R. 264, &c.)

Second section. On hearing the parties &c., either court is "to decree" according to equity, and award execution; and if the debt. do not appear, or refuse to accept what the court award, the money to be left in court &c., and judgment for possession; and the court may award costs according to equity &c.; an appeal lies from the Common Pleas.

By act, Feb. 16, 1816, the redemption of an equity sold is reduced from three years to one.

The third, fourth, and fifth sections, in this act, provide for the attachment and sale of the equity of redemption of the mortgagor, for his debts, in the place of the appraisement, as was allowed and provided for in the Province law.

§ 7. As to several clauses of acts respecting mortgages, see Ch. 108, and especially as to executors and administrators taking possession of mortgage estates; and the act as to recording bonds of defeasance passed in 1802.

Mass. Act, Mar. 4, 1786.

§ 8. By this act, passed in 1786, mortgages given for gaming debts are made void to all intents and purposes.

Mass. Act, Mar. 15, 1805.

§ 9. By this act, passed in 1805, the treasurer of the Commonwealth may, by his release, discharge any mortgage to it.

12 Mass. R. 387.—Anstr. 551, Wooley v. Drag.

§ 10. *Entry sur disseizin*. Held, after the sale of an equity of redemption on execution, there remains nothing in the judgment debtor on which an execution against him can operate. See 2 Cruise, 118, monies laid out by the mortgagee to better the estate carry interest.

ART. 5. *Adjudged cases in the United States.*

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Though most of the late numerous decisions, following in this article, have been made in one State, yet as most of them have been made on common-law principles, they will be found to be of general application in most or all of our States; and hence the most material cases are stated with some minuteness. Perhaps some few of these decisions may be doubtful, arising on a variety of statutes, most of the constructions of which are new and without precedents to be found. Also in deciding our cases on mortgages it is often very doubtful how far English decisions are authorities here or not.

§ 1. No collusion between the mortgagee and mortgagor can prejudice his creditor, who levies on his right to redeem, (or buys it,) but he will have a right to redeem, paying the debt fairly due from the mortgagor to the mortgagee. Kirby, 76, *Eldridge v. Lane & al.* And whenever land is mortgaged to secure a debt, payment of it only will discharge the land; and that will discharge the debt but by foreclosure. Kirby, 254, *Coit v. Fitch.*

In this case A mortgaged lands to B, and A's wife signed the mortgage deed; C, a judgment creditor of A, took his equity of redemption in execution for A's debt, and paid B his mortgage money, and B's administrator went to the registry and discharged the said mortgage; on it being thus discharged, A's wife sued for dower in this land; but judgment was against her; for her husband never performed the condition, and the statute of execution gave the judgment creditor the whole estate; nor was the mortgage ever paid out of the husband's estate.

Mass. S. J. Court, Essex Nov. 1793, *Major v. Putnam.*

§ 2. Charles Vaughan and others, orators in chancery, and citizens of the United States, and of the District, against Copely, a citizen of London, and a British subject, and his agents, Samuel Cabot and William Hull, citizens of said District; the orators this term filed a bill in equity, stating at large that Copely agreed in writing, signed by him, to convey to them certain real estate in Boston, on demand, at an agreed price mentioned,—this written agreement was his letters to his agents (letters signed are valid within the statute of frauds,) in Boston, and their agreement in writing thereon;—and that the orators at ———, on ———, tendered him the money &c., and he refused to convey &c., and prayed that he might be compelled to convey, according to the said agreement, on payment of the purchase money.

U. States, C. Court in Boston, Oct. Term, 1795, *Vaughan v. Copely*; originally a mortgage.—New. on Con. 165, 167, 168, letters or a paper referred to may be a good writing on the statute of frauds.

The orators signed this bill and made oath to the truth of it, filed it, and moved for an *injunction* to Copely, and all persons, his agents, enjoining them not to sell till further order of the court. The court took time to consider of the *injunction*—

Forms of subpoenas, 10 Wentw. 339, 339, 226.

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tion, and then issued it; in the mean time issued subpoenas to Copely and his agents, returnable immediately, as to those near the court; as to Copely, a *dedimus* issued to the American consul in England, to take a deposition of the service of the subpoena, and injunction on him there; though some of his agents who appeared immediately objected that he was a foreigner and out of the jurisdiction of the court. But the orators were to lodge the purchase money in court before an *injunction* issued. It was objected that the suit was not between a foreigner and citizens. But the court overruled the objection, for Cabot, Hull, &c. were only the agents and servants of Copely, and he was the real party to the suit.

Mass. S. J.  
Court, Essex  
Nov. 1801,  
Ivers v. Hooper,  
Pike, &  
Greenleaf.

§ 3. In this case, in which several matters deserve special attention, an action was brought to recover the mortgaged estate in Newburyport, on a mortgage deed, executed October 26, 1762, assigned to W. A., January 10, 1766, and further assigned to the plt. December 31, 1787, who sued in 1799. In this case the mortgagor, his heirs, and tenants, had always been in possession; and in the case it was agreed not to urge any disseizin by any of them when any of the said assignments were made: 1. Interest in this case was calculated on the original debt only, not making interest due at the time of any assignments principal; and no question was made on this point: 2. This mortgage and bond, though made by Harris to Wheelwright, were, in fact, in trust for Trecothick and Thomlinson, of London, though the trust appeared only by the mortgagor's letters to them, which were read to take the case out of the limitation of twenty years: 3. When the mortgage was assigned to the plt., the bond was assigned to the representative of the survivor of the said house. First plea, by Hooper, not guilty: Second, on *oyer* of the mortgage deed, bond, and condition, payment at the day: Third plea, on like *oyer*, payment after the day: Fourth plea, a special bar, a former judgment at large. Pike and Greenleaf also pleaded several pleas severally &c. After a verdict was found, the defts. prayed to be heard in chancery, and the court gave judgment for possession in two months, unless \$89,333 were paid in the mean time; the penalty of the bond was only \$5333.33. The above rule in casting interest on the original contract, not regarding the sum paid by any assignee, was according to our general practice, and seems to be according to our statutes which provide for paying the original debt and interest. (But in *Swinerton v. Fuller*, post, the sum paid by the assignee was made principal, when the mortgagor's assignee sued to redeem.) In this case Harris died in 1768, in possession, and left Mary Hooper his heir; she died in possession, and left Joseph Hooper, one deft., her son and heir;

2 Anstr. 527.  
—3 Cain. 48.  
—2 Mass. R.  
118.—4  
Cranch, 417.  
—1 East, 436.  
—3 Ves. jr.  
557.—Willes,  
262.—2 Dall.  
252, Perrit,  
exr. v. Wallis.  
—2 D. & E.  
388, Lonsdale v.  
Church; but  
Dougl. 491.—  
2 W. Bl. 1190.  
—6 D. & E.  
303.—1  
Saund. 58.—  
5 Ves. jr. 329.  
—1 Ves. jr.  
409.—3 Bro.  
Ch. R. 492.

she and he claimed the estate as their own ; and the heir sold a part to Pike, and a part to Greenleaf, each in severalty, who pleaded each such pleas as Hooper did nearly, see post.

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§ 5. *Judgment for more than the penalty.* In this action it was decided that the conditional judgment in an action on a mortgage must be for the amount of principal and interest due, though it exceed the penalty of the bond :—was ejectment on the mortgage deed ; rule adopted in *Ivers v. Hooper*.

2 Mass. R.  
118, *Pitts v. Tilden*.

§ 6. *How a bond and deed make a mortgage &c. ; how to foreclose &c.* Held, a bond conditioned to re-convey an estate on payment of a sum of money, which estate, by deed of the same date, had been conveyed by the obligee to the obligor, is a defeasance of the deed, and makes it a mortgage, though the defeasance do not say the deed is to be void on payment, but the grantee in it is to re-convey. “ Until the condition be broken the rights and remedies of the parties are *legal* and not *equitable*,”—“ at common law, and not upon the statutes.” If the mortgagee enter before condition broken, and continue to receive the profits, “ the three years do not commence until he give notice to the mortgagor after the condition be broken, that he shall thenceforward hold the possession for the condition broken,” or to foreclose, after broken : “ this entry may be either in *pais*, or in execution of a judgment in a real action.” If he sue, must declare in mortgage, or he cannot have judgment as on mortgage. If the mortgagee “ lawfully enter and take possession, after the condition broken, the three years will commence from the time of such lawful entry.” In order to obtain a judgment of possession in mortgage, he must state a mortgage title, a seizin in mortgage where by defeasance, or state the mortgagor’s seizin and deed where the condition is in it. If the mortgagee declare generally, “ and the mortgagor plead in bar, that the mortgagee is seized as tenant in mortgage only, the condition of which is broken, the action will be barred.” And there can be no oyer where there is no profert. On non-payment, power was given in the mortgage deed to sell ; a sale thereon is a species of foreclosure, and the mortgagee may make a *bond fide* purchase ; and after sixteen years from time of sale, known to the mortgagor or his heirs, no redemption allowed. 1 Cain. Er. 1, *Bergen v. Bennet* ; and 1 Day’s Ca. 124, 295, five years to redeem in Connecticut.

2 Mass. R.  
493, *Erskine v. Townsend*.  
—4 John. R.  
186, *Jackson v. Green*.—2  
Cain. Er. 124.

§ 7. *Bill in equity, and several points decided.* The plt. filed a bill in equity against Fuller, and stated facts at large, (it having been decided in ejectment, that when the mortgagee is in possession, the mortgagor’s only remedy to get possession is by a bill in equity ;) the bill stated that Swinterton, the father, mortgaged the premises to one Nichols, for paying sev-

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Court, Essex,  
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1792, *Swinterton Jr. v. Fuller*.

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eral sums ; that December 10, 1787, he assigned to Fuller, and the father conveyed the equity of redemption to the plt., his son ; that he June 12, 1792, tendered to Fuller £72. 14s. as the sum due, and brought it into court, and prayed judgment and execution for seizin and costs. Fuller alleged the sum due was £82. 10s. and therefore the sum tendered was not sufficient ; also that at the time of the tender he had entered and had been in peaceable and quiet possession above three years. The plt. replied, that he tendered the sum due, and that Fuller had not been so in possession three years. The court tried the facts, and found the sum tendered was sufficient ; and considered the sum Fuller paid Nichols, on his assignment, as principal, and thence drawing interest. On the old law, then not revised, the court allowed repairs, and new fences, to Fuller as improvements &c., and deducted rent ; the assignee, Fuller, had judgment for those not received. 3 Bac. Abr. Mortgages. Here interest was turned into principal, though the assignment was without the consent of the debtor ; see the English rule as to his consent, a. 2, s. 22.

§ 8. *As to entry.* Nichols, Oct. 1787, entered on the mortgaged premises, being pasture land, before two witnesses, shewed them his deed, and told them he took possession ; staid a few minutes on the land, and then went away, and Swinton jr., the assignee of the mortgagor, continued to improve as before, nor had he any notice of the entry. July 1789, Fuller leased the mortgaged premises. The court held, that there was no legal entry on the statute, till the lease was made, July 1789 ;—that the entry, in Oct. 1787, was insufficient, as the mortgagor had no notice of it ; and especially as the mortgagee did not continue the possession. The judgment was, it is considered and decreed that the plt. have and recover seizin and possession of the mortgaged premises, and have execution ; and that the said Fuller have said money left in court.

Mass. S. J.  
Court, Feb.  
1801, Hill v.  
Payon & al.

§ 9. *Where a grantee in a deed is a witness &c.* This was ejectment for a house in Boston. E. Welsh, who owned it, wishing to secure his estate from attachment, and being indebted to sundry persons, conveyed this house, without a valuable consideration, to Waldron ; he conveyed to Tyler, in trust for Welsh. Before this last conveyance, and while, apparently, Waldron's, the plt., a creditor of Waldron, attached it, and levied his execution on it : the defts. claimed under a creditor of Welsh who had also extended upon it. To prove the deed to Waldron was fraudulent, under which the plt. claimed, the defts. produced Waldron. His competency was objected to on the authority of *Walton v. Shelly*, but he was admitted ; and the court said, that of late years, objections to

the competency of witnesses had been much narrowed; that the common-law principle never went further than to exclude a witness from testifying to invalidate a security to which he had given credit by his signature; that the late cases were confined to parties on negotiable papers, who had, by their own acts, given them credit and currency; but in the present case no such reasons existed; "Waldron was simply grantee;" he might not know of the conveyance to him, or be unwilling to countenance it. On the admission of Waldron, the defts. produced the assignment of a small mortgage they had purchased in to protect them; the court thereon advised the plt. to become nonsuit, alleging that ejectment will not lie against a mortgagee in possession, nor if the money was tendered; the only remedy to recover possession in such cases being by bill or petition in equity. See art. 20 and 24 as to prior titles bought in to protect &c. If the second mortgagee, to make his mortgage prevail in equity against a prior one, buy in a legal title older than both, to so prevail, he must be a purchaser for a valuable consideration, *bonâ fide*, without collusion, and without notice of the prior mortgage. 2 Cruise, 220. Notice makes him come in fraudulently, *id.* See 1. D. & E. 763, in *Willoughby v. Willoughby*, cited 2 Cruise, 217 to 238.

CH. 112.  
Art. 5.

§ 10. *Note no defeasance to a deed &c. at law &c.* In this case *Stickney*, the deft. borrowed about £200 of the plts., the two *Gerrishes*, and gave them his note, and an absolute deed of real estate, worth more than that sum, but remained in possession, and the note expressed that if the debt was paid in two years, then the plts. to give the deed back, of the estate, to the deft. The plts. sued the note, it not being paid in the two years. Judgment for the deft.; for the land is but security in equity, though not a mortgage at law, as the deed of it is under seal, and the condition in the note not being under seal, the note cannot be a defeasance in law to the deed, but is in equity. The absolute title to the land has paid the note; for if the deft. now pay it he cannot claim a re-conveyance; then now to pay it, is to pay it twice, this the law will not allow.

Mass. S. J.  
Court, Essex,  
Nov. 1789,  
*Gerrish & al.*  
*v. Stickney.*

§ 11. In this case *Jonathan Bridge* conveyed lands to the plt. by an absolute deed, but intended as a mortgage to secure payment of \$1226,54; and the plt. agreed to give a bond to *Jonathan Bridge* to reconvey to him on payment being made. The bond was given long after, but bore date the day of the deed. Adjudged to be a mortgage; and judgment entered as in mortgage; for the parties to the bond could not contest the date of it. Here the plt. declared on an absolute deed; the plt., by *Jonathan Bridge*, proved the mortgage. In this

1 Mass. R.  
219, Jno.  
*Bridge v.*  
*Wellington.*  
Parties to a  
bond cannot  
question the  
date in it &c.

CH. 112.  
Art. 5.

3 Mass. R.  
138, Newall  
& al. admrs.  
v. Wright.

case also, the general issue was pleaded, not specially that the plt. was tenant in mortgage. A difference as to the form of the action and pleading &c. will readily be seen between this case and the case of *Erskine v. Townsend*, above stated.

§ 12. In this case the debt was to be paid in five years, but the court held, that the mortgagee might enter immediately on taking his mortgage, *oust* the mortgagor, and take the profits if not otherwise agreed: if the mortgagor refuse to quit, the mortgagee may have an action of trespass or a writ of entry *sur disseizin*: that when the mortgagee enters for condition broken, the three years commence on that entry. As to the effect of a lease at the same time &c. See Lease.

3 Mass. R.  
562, Amory  
v. Fairbanks  
& al.

§ 13. In this action the court held, that after the mortgagee has entered and taken possession of the mortgaged premises for the condition broken, and the estate is of less value than the debt, he may sue on the note or bond for the difference, and recover it.

6 Mass. R.  
109, Taylor  
v. Wild &  
Townsend.  
Entry after  
condition  
broken is  
presumed to  
be therefor  
&c.

§ 14. This was a bill in equity to redeem a mortgaged estate. Sept. 18, 1794, Taylor gave Wild an absolute deed of the estate, and the same day Wild gave Taylor a bond, conditioned to give him a warrantee deed of the same on his paying his note to Wild of £23, and delivering up to Wild his note to Taylor for £400, and saving Wild harmless from a certain recognizance; court held, that these contracts constituted a mortgage: Wild entered under this conveyance; Taylor's said note to him for £23 being unpaid, the court presumed that Wild entered for condition broken, by the non payment of the note, there also being some evidence he considered himself as mortgagee. Townsend was tenant under Wild by purchase &c.; defts. answered separately.

6 Mass. R.  
321, L. & K.  
Bank v.  
Drummond.  
How one in  
possession  
need not enter  
for condition  
broken.

§ 15. July 30, 1800, the deft. conveyed to his son, John Drummond, in fee on condition, he to maintain the deft. and his wife for life; the deft. remained in possession. June 27, 1803, the son mortgaged the land to the plts. and they declared on his mortgage deed. The court held, that as the father, the deft., and grantor to his son, remained in possession, he need not enter for condition broken, and the fee remained in him without entry.

6 Mass. R.  
240, Willard,  
plt. in error,  
v. Nason.  
Executor  
&c. has no  
right to possess  
the deceased's  
lands except.

§ 16. In this case held, an executor or administrator as such, has in no case a right to the possession of the deceased's lands, nor can he recover such lands in a real action, except the action be brought to foreclose a mortgage, or to recover an estate mortgaged to the executor's testator &c.; but if an executor or administrator has levied an execution on the lands of the debtor to the deceased, and is afterwards disseized, he may recover such lands, declaring on his seizin as executor or administrator, he is so seized by the levy.

§ 17. And if the administrator of the creditor's estate levy his execution on the estate of the deceased debtor, the administrator is seized and possessed in virtue of his levy, and may as administrator bring ejectment on his own seizin and possession. So when he has recovered possession of lands mortgaged to the deceased.

CH. 112.  
Art. 5.

Boylston v.  
Carver.  
How an administrator's  
levy gives  
him seizin.  
6 Mass. R.  
239, Gould v.  
Newman.

§ 18. *Mortgagee how barred by his assignment and title in a third person &c.* This was a writ of entry brought to foreclose a mortgage given by the deft. to the plt. On *oyer* the deft. pleaded in bar, that since the execution of the mortgage, and before any breach of the condition thereof, the plt. by his deed duly executed, acknowledged, and recorded, assigned all his interest &c. in the demanded premises to one Thomas Pons, in fee simple; that the premises passed to him by the said assignment, and that the plt. had not at the time of commencing this action, nor at any time since the making of the said assignment, any cause of action against the deft.: and replication, that by the deed of assignment Pons was authorized in the plt.'s name, and for Pons' use, to enter, sue, &c. and prayed he might recover for Pons' use. Deft. demurred generally.

The court held, that after the assignment of the mortgaged estate by the mortgagee, the action to foreclose the mortgage must be brought in the name of the assignee. When a man seized of land executes a deed of conveyance, he may afterwards maintain a real action in his own name, if nothing passed by the deed of conveyance. But if a man should execute a conveyance of any kind, by which the estate in fact and in law passed, or his right was extinguished, he could not after maintain an action in his own name to recover seizin, if his conveyance be pleaded in bar. This distinction is to be found in the year books; for if the demandant has no interest in the tenements demanded, he has no cause to question the title of the tenant;" but this matter cannot be in evidence. Here the mortgagee conveyed all his interest in the land, the mortgagor remaining in possession by consent, he made no disseizin to prevent the estate's passing to a third person; but the bond was sued in the name of the assignor, but not satisfied. It will be observed in this case, the deft. to bar the plt. of his action to get possession on his mortgage, pleaded the title of a third person to whom the plt. had assigned his title to the land; and reasonably enough, as the assignment was a matter of record to which the plt. was privy.

§ 19. Held in this case, that when the mortgagor files his bill in equity to have possession of the mortgaged estate, and it appears a balance is due from the mortgagee to the mortgagor, the latter cannot have judgment and execution for such balance upon his bill in equity, but is put to his action at law.

6 Mass. R.  
264, Taylor  
v. Townsend.

CH. 112. Such balance is not by the statutes made part of the case on such bill.

Art. 5.

6 Mass. R.  
60, Inhabitants of Groton v. Inhabitants of Boxborough.

Mortgagor how owner of the estate. How the mortgage lessens the pauper's income &c.

§ 20. In this case the court decided, that when a person having a freehold or estate of above \$10 a year, by which, and living in the town where it lies for three years, he would gain a settlement, mortgages it to secure a sum of money, the interest of which deducted from the annual income reduces it below \$10, within three years he gains no settlement. But the mortgagor is a freeholder while he remains in possession; and as between him and third persons the mortgage is considered only as a pledge. "The mortgagor remains the owner of the estate so long as he continues in the possession of it. Thus he can sell it in fee, subject to the condition, and the purchaser may redeem. So on his death it descends to his heirs, who may redeem; and if an entry should be made on him, or he be disseized by a stranger, he may maintain trespass or entry *sur disseizin*, and the stranger cannot set up the mortgage against him. But to gain a settlement he must have a freehold of the clear annual income of \$10, as so is the provision in the statutes of the State.

6 Mass. R.  
422, Portland Bank v. Stubbs & al.

§ 21. The principle settled in this case was, that when a ship at sea is mortgaged, the mortgagee must take possession as soon as may be on her return, before the mortgage is complete: being a pledge of personal estate, a delivery of it to the mortgagee "is essential to give the pawnee a special property in it." See s. 59, post.

7 Mass. R.  
63, Cary v. Prentiss.  
Poor debtor's oath.

§ 22. Prentiss mortgaged an estate to Cary to secure payment of \$—; Cary was sued as principal for his debt to Henry of \$1328,83, and Prentiss as trustee; as such he was committed to prison and was discharged by taking the poor debtor's oath, and was afterwards released by Henry. Cary brought this action to recover possession of the mortgaged estate and had judgment. The court said, there was "no defence at law, and since Henry's release, none in equity.

7 Mass. R.  
131, Appleton v. Boyd.  
Debt joint, mortgage is so.

§ 23. The court held, in this action, that where land is conveyed in mortgage as collateral security for a joint debt, it is holden in joint-tenancy, notwithstanding the statute of March 9, 1786. One mortgagee died and the survivor assigned to the demandant;—the parties intended the mortgage should follow the right of action to recover the debt.

7 Mass. R.  
355, Taylor & al. v. Porter.  
Mortgagee's right of action how divided, or not.

§ 24. April 1, 1805, Uriah Cotting and others, seized in fee of the demanded premises, conveyed the same to the demandants, Taylor and Wilson; they the same day mortgaged them to said Cotting and others, in fee, to secure the payment of three notes, \$690, \$1035, and \$1035, purchase money. April 2, 1805, the demandants conveyed the same to Artemas Newhall and Leavit Lincoln, who the same day

mortgaged the same to the demandants to save them harmless as to said notes and mortgage they gave Cotting & al. March 27, 1806, L. Lincoln conveyed one undivided half to Porter, the tenant, who engaged to pay half of said three notes, who paid all except \$380, and \$62, a year's interest on \$1035, in all \$442.10. The other half of the mortgaged premises were conveyed by said Newhall to Robbins & Inman, who engaged to pay the other half of said notes. Cotting bought out his partners, and October 15, 1807, conveyed to Porter at his risk, said two notes, \$1035 each, deducting said \$442.10; then Cotting held the mortgage deed, and afterwards assigned it to Chitty & Martin by Porter's direction. Taylor & Wilson demanded all the mortgaged premises of Porter, who had no title but to an undivided moiety, and no possession but in common with others. Judgment for the demandants, who bought of Cotting & al. and mortgaged to him, so became mortgagors of the whole; then sold to Newhall & Lincoln, who mortgaged to the demandants to save them harmless as to their mortgage &c. to Cotting & al., thus the demandants, as mortgagees of Newhall & Lincoln, had a clear right to recover them while the \$442 remained unpaid. When Lincoln conveyed an undivided moiety to Porter he stood in Lincoln's place. And the court held, that as the demandants' mortgagors assigned the land, each half to two to hold in common, and they forced the demandants to sue, each of these two assignees was viewed as deforçant of the whole,—had been the same if one mortgagor had thus assigned to two. CH. 112.  
Art. 5.

2d. The court held, that if two distinct closes are included in a mortgage, and the mortgagor conveys one to A and the other to B to hold in severalty, the mortgagee must have two several writs of entry to foreclose the mortgage, but he shall have judgment on each writ, unless the whole mortgage money be paid.

3d. If either A or B pay the whole money, the mortgage is discharged as to the other, who shall be holden to a reasonable contribution to him that pays, and the same principle holds if there be more than two distinct closes so assigned by the mortgagor to more than two.

A question arises on a view of this case; suppose J. S. mortgages to me one hundred acres in one piece, and remains in possession, and then sells twenty-five acres at the north corner to A, twenty-five acres at the east corner to B, twenty-five acres at the south corner to C, and twenty-five acres at the west corner to D,—thus the four to hold in severalty; must I bring four actions to foreclose?

In this case of *Ivers v. Hooper, Pike, & Greenleaf*, before stated, the heir in possession (claiming the estate) of the mort-

CH. 112. gagor had sold a part of the mortgaged land to Pike in severalty, and another part to Greenleaf in severalty, the action was brought against all of them, and all charged with disseizing the plt., and he had judgment. Hooper, the heir, pleaded not guilty to all, and other pleas; Pike pleaded not guilty as to the piece he purchased, and disclaimed as to the rest, and other pleas; Greenleaf not guilty as to the part he bought of the heir, and disclaimed as to the rest, and pleaded other pleas. These pleas were pleaded by Parsons, and no objection by him or the court, that only one action was brought against the three thus holding distinct parts.

*Mortgagee releases part, the effect.* A takes a mortgage of B of six lots of land to secure a debt, B sells two of them, then A releases four of them; the other two are only liable for their proportionable parts of the debt and interest; for so they were when a stranger bought them. 1 Johns. Ch. R. 425.

*What are repairs &c.* Id. 385. The mortgagee or his assignee in possession, is not allowed his improvements in clearing wild lands, but only necessary repairs, and to account for the profits, except such as exclusively arise from his improvements.

§ 25. *Tenants of distinct part, ejectment against.* This was also the case in *Ritchie v. Elizabeth* and *James Williams*, post, 38, as well as in *Ivers v. Hooper*.

§ 26. *Tenants of distinct parts of the land jointly sued; point examined.* Writ of entry in which the plt. sued on a mortgage deed. March 9, 1809, Eliphalet Fox and his wife were jointly seized of three undivided fourth parts of the demanded premises in fee, and Peter Fox, their son, was seized of the other fourth part in common with them. On that day Josiah W. Coburn attached for debt, on mesne process, "all Peter's estate and interest in the tenements." April 10, 1809, said Eliphalet and Peter mortgaged five acres, parcel of the tenements to D. Abbot, one of the tenants, in fee. July 13, 1809, one Josiah Wood levied his execution on said Peter's undivided quarter, and had it set off by metes and bounds. While this was doing, said Eliphalet and Peter mortgaged to the plt., by the deed declared on, acknowledged the same day, and recorded the next. September 22, 1809, Coburn got judgment, and October 21, 1809, levied his execution on said Peter's undivided quarter, except the part mortgaged to D. Abbot, as above, and set off to said Wood; both of said executions duly recorded. Said Eliphalet died August 10, 1809, and his wife April 7, 1812, of course she had the three fourths by survivorship. She left said Peter, her son, and the tenants C. & S. Fox, with eight other children, her heirs; each tenant defended the part of which he was seized severally, and disclaimed the residue. As to joint-tenants &c.

12 Mass. R.  
474, *Varnum*  
*v. Fox & Fox*.  
—Important  
case.

conveying by metes and bounds, by deed, or levy against him, see Ch. 134, a. 3, s. 31. The conveyance of said Eliphalet became void, as he was joint-tenant with his wife ; hence the plt. can hold nothing under him, and their three fourths on her death descended to her children and heirs ; two of them, Charles and Stephen, were sued ; each of whom took one eleventh part of three fourths, or three undivided forty-fourth parts of the whole ; a partition among the eleven children was understood.

CH. 112.  
Art. 5.

Held, the plt. could not recover against either tenant : First. As to Peter's quarter, he had by prior deeds and executions conveyed his part in different portions, (if a levy on his undivided quarter by metes and bounds was valid :) Wood and Coburn not being sued were out of the case ; then only the conveyance to D. Abbott was in question ; this was valid against said Peter, and all claiming under him, being by his deed, he and they were estopped ; so the plt. is estopped.

Second. It is material to attend to the manner of bringing this action against tenants holding three distinct parts under distinct titles, on which the court observed, "Two or more persons so situated, cannot be joined as tenants in one writ of entry ; the gist of every such action is the supposed unlawful entry of the tenant, or of the person under whom he claims, and the subject of the suit is to disprove the title of the tenant by shewing its unlawful commencement : " "and it is in effect trying two or more titles in one writ ; so one of the tenants may be himself a disseizor, and the other may hold by alienation from a disseizor. But the demandant cannot have a writ against one as a disseizor, and against the other in the *per* ; on the other hand if a man is disseized by two or more persons, the disseizors have one joint estate, and one title ; the entry of all of them is one act ; and the disseizee must, in such a case, sue them all jointly. So if one disseizor convey the whole to two or more jointly, they must all be sued together. But where two persons hold in severalty distinct parcels under conveyances from the same disseizor ; or where they have themselves severally disseized the demandant of distinct parcels, it would be as irregular to join them in the suit, as to join two trespassers, who had each committed a trespass at different times, and on different portions of the plt's. land ; or two debtors who had each given his own bond to the plt. for different debts."

§ 27. This is undoubtedly correct law, if applied wholly to a mere writ of entry, the very point in which is to disprove the tenant's title ; this writ brought by Varnum is called a writ of entry, but neither the form or substance of the declaration is stated in the report. When the demandant sues a mere writ

CH. 112. of entry, he must regard the distinctions above stated, there-  
 Art. 5. fore it is in but a few cases he acts wisely to sue this writ ;  
 because by doing it he involves in his actions all the difficul-  
 ties of the titles and boundaries of the tenant, as to which usu-  
 ally he is quite uninformed. The demandant when he sues  
 may know certain persons are on the land, and if he knows  
 their number, he often has no proper means whatever of know-  
 ing their titles or boundaries, or how they or each may claim ;  
 because in the nature of the case, these are matters merely  
 among themselves, to which the demandant is a stranger.  
 Therefore it is that experienced lawyers have made but little  
 use of this writ of entry, but have resorted to other forms of  
 actions in which they state and rely, mainly on the demand-  
 ant's title, a matter always within his knowledge, especially in  
 getting possession of estates mortgaged. And in these actions  
 the practice has been, and very often of necessity, to include  
 in the action a number of tenants on the land, stating the de-  
 mandant's title, and merely that the tenants are deforcers gen-  
 erally, without meddling with their titles, or boundaries, or  
 those of each. And the action has usually taken a right course,  
 by the tenants being put in a situation to plead and disclose  
 their titles, and respective boundaries ; as if distinctly seized of  
 distinct parcel, each tenant has pleaded, and severally defended,  
 by metes and bounds, the parcel he claims, and disclaims the  
 rest, as each tenant, in *Ivers v. Hooper*, pleaded by their at-  
 torney, Parsons, afterwards Chief Justice. It is true several  
 issues to be tried grow out of such pleadings, on each of  
 which the jury must find a verdict ; but this is every day's  
 practice in most kinds of actions. In *Ivers v. Hooper*, the  
 author brought the action, and grounded it wholly on the title  
 of the demandant ; and one action answered every purpose.

See this sub-  
 ject pursued  
 in land ac-  
 tions & cases  
 cited, and es-  
 pecially Ch.  
 228.

8 Mass. R.  
 169, *Carey v.*  
*Rawson* ;  
 how two  
 deeds make a  
 mortgage.

§ 28. *Writ of entry sur disseizin.* The plt. counted on  
 his own seizin, and a disseizin by the deft ; he prayed to be  
 heard in chancery, and averred that April 7, 1808, when the  
 deed was made to the plt., he gave the deft. a deed of de-  
 defeasance and set it forth, purporting an agreement between  
 them that the deft., in consideration of \$2000 to be paid him  
 by the plt. on deft's. conveying lands &c. to him in fee, will  
 so convey ; that thereupon the plt. will pay the \$2000 ; that the  
 deed of conveyance shall, when recorded, be deposited with A  
 till the said sum be repaid with interest, or until April 7, 1810,  
 and on default of payment, said deed to be delivered to the  
 plt., and he may enter and take the profits to his own use.

The court held, "that the two deeds must be treated as  
 parts of one transaction, and together constituted a mortgage ;"  
 and the deft. was heard in chancery. As mortgagor, what  
 could be the judgment on the declaration on title in the plt.,  
 not in mortgage, see *Ersine v. Townsend*.

§ 29. In this case the husband mortgaged his lands, and his wife joined in the deed, and released her dower to one Capen, and he entered. The husband died, and afterwards, November 9, 1807, one Dyer administered on his estate, who by license of court sold this equity of redemption to Abel Wheelock, who sold it to the deft., who September 19, 1810, paid Capen. The plt. replied, Capen, September 19, 1810, discharged the mortgage, whereby the said mortgage deed was cancelled. The deft. demurred, generally. The court held, the plt. was barred of her dower; the court thought that when the deft. had paid the mortgagee, he, the tenant, had the equitable estate, and that the legal estate followed it; and when the mortgagee discharged the mortgage, his discharge might be considered as a release of the legal estate to the deft. and to operate as an assignment of it to him.

CH. 112.  
Art. 5.

8 Mass. R.  
491, Popkin  
v. Bumstead.  
—How dower  
is barred  
if a third person  
satisfy  
the mortgage.

§ 30. *Entry sur disseizin*, for lands in Freeport. Plt. stated Thomas Millet, May 6, 1805, was seized in fee, and for \$130 conveyed to Jacob Johnson, who that day gave a penal bond to Millet, conditioned to re-convey the premises recited therein to have been conveyed to Johnson as security. Johnson conveyed to one Reed, September 13, 1808, who, May 3, 1809, conveyed to Israel Millet, the tenant, having a right to redeem; the demandant and others took his right to redeem in execution April 9, 1809, and sold it May 22, 1809, &c. and tendered to Israel Millet, the last assignee, his debt. Held, 1. The sheriff's sale gave the purchaser seizin of the land against a stranger; so an action against the mortgagee himself after payment, or tender of the money due on the mortgage: 2. The bond to re-convey, or assignment not being recorded, did not convey the right to redeem, (bond was assigned by the tenant to Israel Millet, April 10, 1809,) the bond being a chose in action not assignable, did not convey the mortgagor's right to redeem to Israel Millet, the assignee of the mortgagee, nor could this bond be converted into a conveyance as a release of the equity; nor was Israel Millet in possession. Judgment for the demandant. See Mass. statute of June 23, 1802. Thomas Millet remained mortgagor in possession, so he was sued and his right to redeem was purchased by the plt. at auction; and they having all his right sued him as a disseizor.

9 Mass. R.  
101, Porter v  
Millet.

§ 31. Bill in equity. In this case James Davidson and wife mortgaged to William Gardner lands in Bath, to secure payment of \$3000 in eighteen months from the — day of August, 1797. September 1797, he assigned to the defts., Thomas and David Agry. May 8, 1799, they sued the mortgage, and in July 1799, got judgment in the Supreme Judicial Court, and took possession May 5, 1800. Pending this

9 Mass. R.  
179, Howard  
& al. v. Agry  
& al.

CH. 112. ecutors, and died before entry for condition broken. James  
 Art. 5. alone accepted the trust and inventoried this debt and mortgage specifically, as part of his father's estate, but never settled any account. November 6, 1809, he mortgaged the premises with covenants of warranty &c. to secure his own debt to one Ebenezer Williams, assigned the same day by said Ebenezer to Duncan Ingraham, the demandant's testator. December 20, 1811, said James, as executor, assigned said first mortgage of August 9, 1809, and debt to said Elizabeth (she and he being the defts. ;) she, 1812, recovered two parcels of the mortgaged premises in an action against him in his natural capacity. She defended these two parcels and disclaimed the rest ; said James possessed the remainder. Judgment for the demandant. It may be observed first on this case, though the creditor made his debtor his executor, it did not extinguish the debt ; nor would it have been extinguished if the executor had not inventoried it ; on this point the devise to the wife of the mortgagee had no effect, because the devise was in general terms of the income of all his estate for her life : 2. An executor, as such, holding a debt and mortgage, may mortgage the same for his own private debt, as by our statute he may sell and assign the same : 3. As this debt and mortgage were not specifically by the mortgagee devised to his wife, the disposal of them was not in her, but in his executor, so his assignment as such to Ingraham's assignor was valid : 4. One deft. was in possession of one distinct part of the demanded premises, and the other deft. of the other, yet both were sued jointly, and recovery against both (as in *Ivers v. Hooper &c.*) and no objection on this account ;—was ejectment by Ingraham's administrator with the will annexed.

11 Mass. R.  
 125, Perkins  
 v. Pitts.

§ 39. *The making of the mortgagee's title absolute presumed, as the consideration of his discharge on an execution on the bond.* This was covenant of seizin &c. on the deft's. deed of July 20, 1801, and alleged it was not in the deft. but in one Aaron Porter. July 5, 1783, John Tyng, (deft's. testator) made his deed of a large tract of land (including the premises) to Ezekiel Bradstreet and Benjamin Nason jr. ; July 7, 1783, they mortgaged the same to Tyng to secure payment of their bond to him for £2100 and interest in seven years. February 8, 1785, Bradstreet released to Nason all his right in said mortgaged tract ; August 14, 1800, Nason conveyed all his right therein to James Sullivan ; August 15, 1800, he conveyed all his right therein to John Pitts, the deft., all by deeds duly recorded. 1795 or 1796, Tyng got judgment on said bond against said Nason ; and November 21, 1796, took out execution. Tyng died, and left Pitts, the deft., his executor ; and August 15, 1800, (the date of Sullivan's said deed) Pitts

made a discharge on said execution as Tyng's executor, acknowledging satisfaction of it. Hence, the plts. urged the debt was paid, and so the said mortgage to Tyng was discharged and his mortgage title at an end : and if Pitts had any title, it was under Sullivan's said deed, so a younger title than Porter's ; for August 28, 1783, said Bradstreet conveyed to Jeremiah Allen the land described in the def't's. deed to the plts., under which deed Allen immediately entered ; January 15, 1788, Allen conveyed to said Porter, all by deeds duly recorded. Porter was admitted a witness for the plts., the man in whom they alleged the title was, though objected to, who testified he entered under his said deed from Allen &c., as to a deed of division between Bradstreet and Nason, and the loss of it before recorded.

Held 1. Pitts' receipt on said execution was not conclusive evidence of a discharge of the said mortgage, as a release of the judgment might have been : 2. It was competent to the executor to explain the transaction, and to shew the nature of the satisfaction received, and the occasion and consideration on which it was acknowledged : 3. It was to be presumed the satisfaction received in discharge of the execution, was the confirmation or making absolute the executor's title under the mortgage. Verdict for the plts. set aside ; the court considered this presumption well founded ; for the day before Pitts' discharge [on the execution, Nason claiming also Bradstreet's half, conveyed all his right to Sullivan in fee, the mortgage then clearly in force, and the next day, that of said discharge, Sullivan conveyed the same right and interest to the def't. ; otherwise, there was this absurdity, the mortgagor released his right to redeem, or all his right and title, at the very moment the mortgage debt was paid to the same person to whom the release was made.

§ 40. Any person in possession of the land mortgaged is liable to the action of the mortgagee : 2. Non-tenure cannot be pleaded but in abatement :—was entry *sur disseizin* by the assignee of the mortgagee in which he stated Swan's disseizin, who pleaded in bar he was not tenant of the freehold &c., but one T. A. was &c. ; general demurrer to this plea. "An action for possession by the mortgagee is not governed altogether upon the principles applicable to real actions ; it is wholly bottomed on our statutes ; the right to the freehold is not decided in such action ;" and it may be added, the mortgagee's writ to get possession ought not to be called a writ of entry.

§ 41. *Entry sur disseizin—on the plt's. seizin.* November, 7, 1810, one Dutton, seized in fee, mortgaged to one Gage, and June 29, 1811, sold for a valuable consideration with

CH. 112.  
Art. 5.

11 Mass. R.  
216, Keith v  
Swan.

11 Mass. R.  
222, Warren  
v. Childs.

CH. 112. warranty to B. & N. Tucker, mentioning Gage's mortgage.  
 Art. 5. October 11, 1811, Dutton being in possession and then erecting a house &c. the demandant attached the estate as Dutton's property (though his deed to B. & N. Tucker had been duly recorded;) and May 1812, got judgment, and within thirty days levied his execution in due form. But Nov. 7, 1811, before the attachment, Childs, the tenant, agreed to purchase of B. & N. Tucker subject to Gage's mortgage, and gave his note for \$900, lodged in the hands of their attorney, Mr. Bridge, and took his obligation to procure their deed to Childs, and the same day he took Dutton's deed in due form, and Childs entered November 15, and continued seized till said levy. November 11, 1811, B. & N. Tucker released to Dutton in fee, instead of Childs; this release Bridge delivered to Childs and took up his obligation; release recorded December 5, 1811, being no notice of the attachment. Held, nothing passed by B. & N. Tucker's release to Dutton, and the demandant took nothing by his levy. If this gave any title, it was by relation to the time of the attachment, and then Dutton had no right. The legal title was in the mortgagee, also the Tuckers were disseized Nov. 11, 1811, by Childs, who entered under Dutton's deed claiming title; nor was Dutton in possession, and as Gage had his mortgage, there could not be an extent and appraisal of an equity of redemption, the most Dutton could have on any construction; demandant nonsuit.

11 Mass. R.  
 300, Hicks in  
 equity. v.  
 Bingham.

§ 42. Held, where a mortgagee of two parcels of land released one to an assignee of the mortgagor, she was held to apply the monies paid by him for the release, in discharge of so much of the sum due on the mortgage, though the mortgagor was still indebted to her on other accounts.

11 Mass. R.  
 469.

§ 43. After the foreclosure of a mortgage made to two joint creditors, the mortgagees are tenants in common of the land:—was assumpsit. 1 Ch. R. 58, Vern. 271.

12 Mass. R.  
 300, Jewett v.  
 Warren.

§ 44. My liability for A on a contract in force, is a sufficient consideration for his giving me a mortgage or pledge, and the amount of the liability compared with the value of the property mortgaged or pledged is of no importance. Of the delivery of goods as necessary to transfer the property in them. It is enough the delivery be in the usual way; as where the maker of a note pledges logs lying in a boom, a place enclosed in a river, to his endorser to secure him, and gives him a bill of sale and shews them to him, and he claims them on proper occasions, though he puts no keeper over them, but the pledger really takes care of them, which he may well do on account of his right to redeem; was trover.

§ 45. Covenant on a deed, dated January 28, 1806, of lands in Augusta. In this case A mortgaged them to a bank, then conveyed them to C, with a covenant against incumbrances; and C, the plt., mortgaged them to D; the bank got possession on their mortgage and their title became absolute. C sued A on his covenant against incumbrances; and held, he was entitled to damages against A, but as A was also liable to D, it was further held C was entitled only to nominal damages, as he had not paid his mortgage to D. A's covenant to C was broken when C mortgaged to D, so did not pass with the land to D as to incumbrances, and D being evicted, had a right of action against A on his general covenant. But if D recover against C as his immediate warrantor, as he may, then C will have a right of action against A for real damages; but at the time of this action C had sustained no real damages, as he had parted with the estate in mortgage for a consideration, and had not redeemed, and had not been sued as warrantor.

CH. 112.  
Art. 5.

12 Mass. R.  
304, Wyman  
v. Ballard.

§ 46. *A has a mortgage for his own debt, also that of B, not sufficient for both, he may pay his own first &c.* Though A engage, that when he by sale or appraisal of the mortgage premises, can realize a sum equal to both debts, he would dispose of them and apply the proceeds to pay the debt due to B; A having sold them for the most they would fetch, but not for enough to pay both debts, A was allowed to pay his own first and to pay the residue only to B.

12 Mass. R.  
321, Marshall  
v. Bryant.

§ 47. Ejectment by the administrator of the mortgagee to obtain possession of the mortgaged premises; mortgage dated September 24, 1773, to secure a note for £871. 16s. 10d. to be paid in three months, with interest. The note was lost, probably taken away or destroyed by the British troops when in Boston; no evidence of possession or demand of it till 1814, but the mortgagor left this state in 1776, embarrassed, and went to New York with those troops, and there was assassinated. Judgment for the debts, who held under deeds from the mortgagor made in 1773 and 1774, who had adverse possession thirty-six years,—nor was the original mortgaged deed produced at the trial.

12 Mass. R.  
379, Inches,  
adm'r. v.  
Leonard & al.

§ 48. *Where the mortgagor may elect to view the mortgagee in possession to foreclose or not: after a tender within three years' time, to redeem may be twenty years.* As where March 5, 1798, one Jonathan Winship seized in fee of several parcels of land in Brighton, mortgaged them to Samuel Brown in fee, as security for \$7000, to be paid with interest in one year. September 15, 1805, Brown assigned the same to the deft., Abiel Winship, who had been in possession after March 6, 1798. September 14, 1808, Thomas Williams attached the mortgagor's right to redeem, and tendered \$10,700 to said

12 Mass. R.  
514, Pome-  
roy v. Win-  
ship.

CH. 112. Abiel, (said in the bill in equity to have entered that day for condition broken,) in full of the sum due on said mortgage, deducting rents &c.; this said Abiel refused to accept. Williams recovered judgment for \$1638.94 &c., and caused the equity of redemption attached, to be regularly sold to the plt. for \$8000, and he became seized of said right; Williams remained always ready to pay from the time of said tender. The plt. the day he exhibited his bill in equity, tendered the deft. \$11,000 in order to redeem &c., he refused &c. Brown made no entry; deft. claimed to hold in his own right from March 6, 1798, under a deed from the mortgagor said to be fraudulent; but the deft. made no new entry for condition broken when he became assignee of the mortgage, nor did he ever declare he held for condition broken.

Held 1. If the mortgagee enter before condition broken, he may commence his foreclosure without a new entry, by declaring he holds for condition broken, after in fact it is broken: 2. If he make no such declaration, the mortgagor may elect to view him in as claiming to foreclose, by bringing his bill in equity at any time within twenty years after a tender of performance seasonably made: 3. In the officer's notification of the sale of an equity of redemption a general description of the property is sufficient, as the farm in B, A. W. lives on: 4. Giving a reasonable time to the purchaser of the equity to examine the title before the delivery of the deed, is not a sale on credit: 5. Nor is there any objection on account of fraud, after the bargain is completed by the delivery of the deed: 6. If in a hearing in equity a deed relied on is impeached as fraudulent, the court will empanel a jury to try the question:—was on a bill in equity.

13 Mass. R.  
207, Portland  
Bank v. Hall.

§ 49. *What interest is not attachable.* Decided on a petition for partition. Daniel Tucker owned the land; the deft. and one Jonathan Tucker endorsed his notes negotiated to certain of his creditors for his debt, and he conveyed it in mortgage to his said endorsers as their security. Said Daniel paid a part, and said Hall alone paid the residue; to him said Daniel released his right to redeem. After said payments, and before said release, said bank attached a moiety of the land, as the property of said Tucker, got judgment and levied on it. Held, he had no attachable estate in the land, after the mortgage and before the release. And the court said, that Daniel Tucker conveyed to Hall and Jonathan Tucker no estate, which could be subject to attachment by their creditors; for he conveyed no present estate, but his deed operated merely as a pledge to secure them against a future contingency, and said Jonathan was never damnified, nor can he be; Hall acquired a permanent interest.

§ 50. Bill in equity to redeem lands Scott's father had mortgaged to John Southgate, the deft's. intestate. Held, 1. The money due on the mortgage is properly tendered to the mortgagee's administrator : 2. A release of such equity cannot be proved by parol evidence : 3. Evidence that proves the mortgagee has entered, or holds possession for condition broken. As where the mortgagee, some years before condition, leased the mortgaged premises to A, who entered and occupied eighteen years under the mortgagee and his representatives ; many repairs were made by the mortgagee, and some adjoining land added. In March 1814, the plts., heirs of the mortgagor, tendered the mortgage debt to the mortgagee's administrator. Held, as above, that the plts. had a right to redeem : there were several proposals, made by the mortgagee, to buy the equity of redemption, but nothing was executed ; and the bond of defeasance ever remained with the mortgagor, (mortgage being by it, and an absolute deed :) mortgagee did not enter for condition broken, as it was not broken when he entered, merely continuing this possession, taken merely by him, as mortgagee, did not prove his intention to foreclose ; there should have been some act or declaration, " from which notice to the mortgagor might be inferred, shewing that he continued possession with a different motive from that which induced him to enter ;" nothing of this appeared in the mortgagee's life time, nor after his death. " A mere claim of a mortgagee to hold the premises as his own, without any declaration that he means to foreclose," is not sufficient to foreclose ; except after a long time, where the mortgagor is of age, and knows the nature of the mortgage. 4. Account was directed to be taken of the rents and profits, " with an allowance for necessary and suitable repairs and expenditures."

CH. 112.  
Art. 5.

13 Mass. R.  
309, Scott &  
al. v. M'Far-  
land, admr.

§ 51. *Writ of entry to foreclose a mortgage.* Oyer, and plea in bar, a life estate in the mortgagor absolute, and only a mortgage of a reversionary interest. Replication and rejoinder, to which there was a demurrer. Held, an action lies for the mortgagee of a remainder or reversion to foreclose the mortgage in the life time of the particular tenant. No plea in abatement in such cases, the mortgagor is not tenant of the freehold, can avail him ; reasons at large.

13 Mass. R.  
429, 432, Pen-  
niman v. Hol-  
lis.—See Ch.  
177, s. 12, s.  
14.

§ 52. *Writ of entry for three pieces of land in Dunstable,* on the plt's. seizin, and disseizin by the deft. Held, 1. A mortgage made on a *usurious* consideration, is void only as against the mortgagor and those legally holding the mortgage premises under him : 2. A purchaser of the equity of redemption cannot avoid the mortgage by plea or proof of usury : 3. A mortgagee may so declare generally, and have judg-

13 Mass. R.  
515, Green v.  
Kemp.

CH. 112. ment at common law, as well after as before condition broken,  
 Art. 5. and against the mortgagor or his assignee : 4. If the deft. ob-  
 ject to the form of the action he must to plead the mortgage  
 and condition broken before the action commenced.

13 Mass. R.  
 498, Dana v.  
 Newhall & al.

§ 53. Declaration on the plt's. seizin in fee and mortgage :  
 one deft., Oliver Newhall, pleaded he did not disseize ; the  
 other was defaulted, Ezekiel Newhall. Said Oliver convey-  
 ed to said Ezekiel in fee, by deed dated March 16, 1805 ;  
 recorded June 9, 1809. March 14, 1814, he mortgaged to  
 the plt., recorded &c., after said deed was made to said Eze-  
 kiel, and before recorded, it was agreed between him and  
 said Oliver to annul the bargain, and said deed was delivered  
 back to him ; the said Ezekiel obtained it by fraud, and got  
 it recorded. Held, the mortgage was good ; for Ezekiel's ti-  
 tle was good under the deed, and could not be defeated to the  
 prejudice of a *bonâ fide* purchaser, "without an actual can-  
 celling of the deed." Ezekiel was in possession when he  
 gave the mortgage.

18 Mass. R.  
 483, Wellin-  
 gton v. Gale.

§ 54. *How a disseizor may defeat a sale of an equity of redemption. Entry sur disseizin.* Count on the plt's. seizin  
 within five years, and disseizin by the deft. The plt. got judg-  
 ment for a debt against Amos Brown jun., grantee of the  
 mortgagor, and caused his right to redeem to be sold at auc-  
 tion ; officer returned, that "after giving public notice of the  
 time and place of sale, agreeably to law, in such cases made  
 and provided," he proceeded to sell, at auction, to said Wel-  
 lington. Held, 1. This return was bad, because it did not  
 state how notice was given : 2. That the deft. might take ad-  
 vantage of it, though only a disseizor in possession at the time  
 of the seizure and sale on the execution : 3. Parol evidence  
 was not admitted to prove proper notice by the officer : 4.  
 But his deed to the plt. was admitted : 5. Plt. not allowed to  
 shew a title he acquired after this action was commenced : 6.  
 One possessed for 13 years by disseizin only, may put the plt.  
 to shew a title : 7. If the plt. could shew a title, this adverse  
 possession would not prevent the operation of the officer's  
 deed, because only of an incorporeal hereditament, as this  
 equity of redemption was : 8. The deft. had no right to ob-  
 ject to the plt's. judgment against Brown, not being his cred-  
 itor &c. : 9. In all cases the demandant "must shew an actu-  
 al seizin according to his count,"—explained a legal actual seiz-  
 in, for he did enter in fact, under the officer's deed.

See also 13  
 Mass. R. 472,  
 Andrews v.  
 Hooper.

Bolton v. Bal-  
 lard, 13 Mass.  
 R. 227 ; de-  
 cided 16 Mass.  
 R.

§ 55. *Dower in cases of mortgages.* If the mortgagor, di-  
 rectly or indirectly, pay the debt, his widow will have dower.  
 As where he conveyed his equity of redemption to A, he  
 agreeing to pay the mortgagee his debt, and the balance to  
 the mortgagor ; this was done ; and dower accordingly. The

mortgagor is the sole owner, except as to the mortgagee, till he takes actual possession, or till foreclosed; court inclined in favour of dower in such case. So if she sign the mortgage deed, and after her husband's death his administrator pays the debt, she is dowerable, and though allowed by the judge personal estate in lieu of dower. *Hildreth v. Jones & al.* CH. 112. Art. 5.

13 Mass. R. 525.

§ 56. The material points settled in this case were, that the mortgagee's estate and right to possession continues until the full and complete performance of the condition, or a tender equivalent thereto. Hence a plea that shews performance but in part is bad. But a plea may bar a conditional judgment under the statute which will not bar a recovery of possession. Court gave judgment for possession at common law, where the plt. declared on a mortgage deed. Also said by Wilde J. that a tender of the debt discharges the mortgage security, though the debt may remain. Judgment on a mortgage may be entered, on filing an attested copy of the mortgage deed, instead of the original,—and made a general rule.

14 Mass. R. 101, *Darling v. Chapman & al.*

14 Mass. R. 362.

§ 57. *Which of two assignees prevails.* A, being mortgagee, delivers his mortgage to a scrivener to prepare an assignment to B; before it is prepared A assigns, on a separate paper, to C, another creditor, recorded &c. before the assignment to B is completed. C holds the estate, though he knew the mortgage deed was so delivered; for by this delivery no interest passed to B; and C being a *bonâ fide* creditor had a right to secure himself in this way by his vigilance.

15 Mass. R. 233, *Warden v. Adams.*

§ 58. *Mortgage for maintenance.* A mortgaged land to husband and wife for their maintenance for life, he died and she sued. Decided, she had a right to be supported where she chose to live, not creating any needless expense to the mortgagor or his assigns; and as he did not perform, she had a right to the possession; but judgment on condition he pay the arrears in two months. There was nothing in the contract directing her to be supported in any particular place.

15 Mass. R. 262, *Wilder v. Whittemore.*

§ 59. *Mortgage of a ship at sea.* Held, if A take an unconditional bill of sale of such a ship, and take out a certificate of enrolment in his own name, he is liable for repairs, though he have no possession or other concern with her; and though the mortgagor or his master employ him who makes the repairs; for the bill of sale and certificate of enrolment shew the mortgagee publicly to be the owner, and his writing to re-convey is a private act.

15 Mass. R. 477, *Tucker v. Buffington & al.*—See *Jackson v. Vernon.*

*Chennery v. Blackburne*, 1 H. Bl. 117, *Jackson v. Vernon*, the mortgagee of a ship is not liable for stores before he comes into possession.

CH. 112. ART. 6. *Several matters as to mortgages.*

## Art. 7.

§ 1. A mortgagee is a purchaser *pro tanto* for a valuable consideration, is one rule; a second rule is, "where a man has law and equity on his side, he shall not be hurt in a court of equity;" or "a court of equity will not take away the benefit of the law from him," whenever *bona fide* purchaser, for valuable consideration, and without notice of that benefit, he must prevail in ejectment: so if instead of buying such benefit, he takes the title deeds in England, and the first mortgagee &c. be negligent. See art. 2, s. 26. And he may buy in this benefit *pendente lite*, but not after judgment. *Bristol v. Hungerford*, 2 Vern. 524; *Wortley v. Birkhead*, 2 Cruise, 243 to 249.

1 D. & E. 763,  
cited 2 Cruise,  
216 to 229.—  
1 D. & E. 765.  
—2 Vern. 29,  
81, Hawkins  
v. Taylor.—3  
Atk. 609.

§ 2. *Notice of prior incumbrances is direct and constructive.* This is the material point on which tacking prior to subsequent incumbrances depends; and the question is, if the mortgagee had notice of the prior incumbrance at the time of his purchase; this is a question of fact depending on the evidence. Cases cited, 2 Cruise, 249.

1 Vern. 232.

§ 3. *Foreclosure.* This in some States is according to the English practice, by bill in equity. For this see 2 Cruise, 251, &c. Neither in that, nor our practice, can any step be taken to foreclose until the mortgage is forfeited. The ways to foreclose are by bill and decree in equity; or by getting possession by ejectment or entry on our statute, or at common law, and keeping possession the legal time, (in this State three years.) See sundry cases in this chapter, both English and American. See Index, Mortgages.

ART. 7. *Special cases in New York and Virginia.*

10 Johns. R.  
414, 417,  
Jackson v.  
Pierce.

§ 1. A mortgaged an undivided part of a large tract of land, and then partition was made of it; held, the mortgage attached to his part in severalty. *Bona fide* purchaser of a mortgage not affected by his usury. Ch. 153, a. 5, s. 2.

2 Johns. R.  
510, 525,  
Johnson & al.  
v. Stagg.  
Other cases  
in N. York,  
a. 2, s. 9, a.  
5, s. 6, 24, 36,  
37.

§ 2. The registry of the mortgage is notice to all the world: 2. The statute (Sess. 24, c. 145) requiring mortgages to be registered, extends to leases assigned by way of mortgage: and 3. Where a demise is made by way of mortgage of leasehold property, the lease itself need not be delivered to the mortgagee;—is no evidence of fraud, if left in the mortgagor's possession, as the act requiring the registry of the mortgage effectually secures after mortgagees and purchasers against fraud or imposition,—they must look to the registry at their peril.

10 Johns. R.  
480, 481.

§ 3. *Ejectment*; and held, the assignee of a mortgagee in possession of the estate mortgaged is protected by the mortgage, though no foreclosure is shown; this is not the case of a stranger setting up an outstanding mortgage.

§ 4. Ejectment to recover lot No. 1. The plt. claimed title under a mortgage made by Samuel Clark to the plt's. lessor, October 3, 1806, recorded October 10, 1806. The mortgagor was in possession when he gave the mortgage; mortgagee got judgment and execution on his bond, and the sheriff sold the mortgaged premises on the execution to the deft. August 1, 1811, for \$70, who knew the mortgage and debt \$724, remained not satisfied. Held, he bought only the debtor's equity of redemption, and the mortgagee recovered the mortgaged estate in ejectment. CH. 112.  
Art. 7.  
10 Johns. R.  
481, 483,  
Jackson v.  
Hull.

Held, also, the mortgagee has in New York three remedies: 1. An action on his bond or note: 2. To get possession of the rents and profits of the estate mortgaged by an action of ejectment: or 3. He may foreclose the equity of redemption, and sell the land to pay the debt; all or either of which he may pursue until his debt is paid. The sale is at public auction.

§ 5. A mortgages a lot of land to B, C buys a part of it, and D a part; C afterwards pays more than his share of the debt in proportion to the part of the lot he owns, he has contribution of D of his *aliquot* part, or such part of it as has been so paid, but not for any part advanced by him less than his proportion, though D has paid nothing. 10 Johns. R.  
32, 34, Saw-  
yer v. Lyon.

§ 6. If the mortgagee sell to a *bonâ fide* purchaser according to the act, (Sess. 24, c. 145) it is a foreclosure and sale under a decree in equity, and cannot be defeated, where there is a power in the mortgage to sell. 10 Johns. R.  
185, 197,  
Jackson v.  
Henry.

§ 7. A stranger not claiming under a mortgage cannot set it up to defeat a legal title. 10 Johns. R. 381, 387. May be at an end if it sleep nineteen years; *Id.*

§ 8. What a pledge and not a mortgage; see Ch. 17, a. 4, s. 11. Mortgagee's estate cannot be sold on execution till foreclosed. Ch. 136, a. 19, s. 5. Where the mortgagee need not give notice to quit; Ch. 178, a. 33, s. 11. As where there is no privity; *Id.* A mortgage of furniture a mortgagor remaining in possession, Ch. 32, a. 6, s. 7.

§ 9. The mortgagor is deemed seized and legal owner as to all persons, except the mortgagee and his representatives, and his widow has dower &c. 6 Johns. R.  
290, Hitch-  
cock & al. v.  
Harrington.

§ 10. Where the mortgagor's widow will have dower, Ch. 130, a. 4, 5, 92, s. 93; Ch. 178, a. 25, s. 14, in New York. See *Runyan v. Mersereau*, 11 Johns. R. 534.

§ 11. A and his wife mortgaged her land to B in 1771, and A for £125, in 1788, released to B in fee; he retaining the mortgage deed, covenanted thereon not to sue A or his representatives for the money due; held, this covenant is no 11 Johns. R.  
534.—  
8 Johns. R.  
168, 172,  
Denn v.  
Wynkoop.

CH. 112. satisfaction, and B's title remains good. If a mortgage be  
 Art. 7. redeemable or not is a question in chancery.

9 Johns. R.  
 691, 614,  
 Grant v. Du-  
 ane.

§ 12. Where the equity of redemption is presumed to be foreclosed by lapse of time. S. in 1765, mortgaged a tract of land to G. to secure a debt. In 1766, S. B. & C. her partners in trade, being insolvent, compounded with their creditors, and by indenture of three parts conveyed all their estates to D. E. & T. and to the survivors &c. of the third part in trust for the creditors of S. B. & C. of the second part; their debts were said to be in a schedule annexed. S. died, and E. & F. died in the revolutionary war, and D. died in 1797. In 1799 his executors, and named as trustees in his will, filed a bill in chancery against the heirs of G. for redemption, and, after replication was filed and publication passed, the heirs of D. in 1806 were made parties complainants. Held, after such a lapse of time it must be presumed the debts of S. B. & C. had been paid, and the objects of the trust satisfied out of other property or otherwise, the existence of any of the debts not being shown; and that D's heirs had no interest that could entitle them to redeem: And if any equity of redemption remained it was in the heirs of S., the mortgagor, especially as the indenture relied on by the complainants was not executed by the trustees or creditors, nor had any schedule annexed to it, and some evidence of settlement &c. between the insolvents and their creditors. And generally no one can come into a court of equity to redeem a mortgage, but one entitled to the estate of the mortgagor, or who claims a subsisting interest under it.

§ 13. Dower in cases of mortgages; see Dower, Ch. 130, a. 4, especially s. 92, 93, dower in equity of redemption.

Lawson v.  
 Tilden, lessor  
 of Goodright,  
 2 Hen. & M.  
 95, 99.

§ 14. If interest on a mortgage debt is to be paid annually, if lawfully demanded, and on failure the mortgagee to enter; held, a demand of interest should precede a suit to recover the land on an alleged forfeiture for not paying such interest. Decided on an appeal from a judgment of the District Court of Winchester.

Jackson v.  
 Bronson, 19  
 Johns. R.

§ 15. Held, the mortgagor can maintain ejectment against the mortgagee or his assignee in possession, even after his estate is become absolute at law. This decision has been with good reason called in question. 1 Law Jour. 190, A. D. 1822.

Dabney & al.  
 exrs. and  
 legatees of  
 Sadler v.  
 Green, 2 Hen.  
 & M. 101.

§ 16. *An absolute deed on its face proved in equity a mortgage.* The bill in equity stated, that Green being indebted to Sadler, March 7, 1788 by deed, for £126. 11s. convey to him six slaves (naming them) with their future increase, though apparently absolute, it was intended to operate as a mortgage for said sum due from him to Sadler, payable March 7, 1791;

that Sadler, when said deed was delivered, made to him (Green) a defeasance, agreeing that on payment of said sum &c., his, Sadler's, right to the said slaves should cease, Green to keep possession of them, paying interest &c. Held, 1. The true question is, if a purchase of the property, or a loan of money, or forbearing a debt were intended: 2. The evidence proving the deed a mortgage was in other writings, and in acts of the parties: 3. If the mortgagee get judgment for his debt, and on execution buy the mortgaged property, he does not in general deprive the mortgagor of his right to redeem: 4. But he loses it if the creditor get such judgment and execution on an attachment against him, as an absconding debtor attempting to defraud the mortgagee of his security by moving the property out of the State; for "he who has done iniquity shall not have equity." See Ch. 86, a. 4, s. 25, &c., several cases shewing that an absolute deed on its face may be proved a mortgage. The cases cited in *Dabney v. Green* will be found generally in this work. A statute authorizes such attachment.

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Art. 7.

§ 17. *The equitable lien of the original vendor as to bona fide mortgagee of land without notice &c.* As if the mortgagor purchase of A and mortgage to B, B may well purchase a release of the mortgagor's right to redeem (even after notice from A) in consideration of any just claim of his on the mortgagor, arising prior to such notice from A; but after such notice his *lien* attaches for so much as he may have actually paid or agreed to pay for the release over and above his claim for which he took the mortgage, and which originated before such notice: 2. If A convey land to B by an absolute deed of bargain and sale, and acknowledge he has received the consideration, but takes B's bonds for the amount, and A continues possession by a parol agreement to retain it till B perform, A has an equitable *lien* on the land against one purchasing from B, having actual notice of such agreement: 3. In equity either party to a deed may prove the true consideration against the other or against a purchaser with notice; *secus*, as to a fair purchaser without notice. In the above case it will be observed, that plt. was allowed to claim a latent equity, and a *lien* for the consideration money, against his absolute deed acknowledged and recorded, and against his direct acknowledgment by his deed, that he had been fully paid that very consideration money.

*Duval v. Bibb*, 4 Hen & M. 113, 124.

*Declarations on covenants in mortgages by mortgagee:—*for non-payment of interest against the mortgagor's auditor, who had received monies therefor: against the mortgagor for the mortgage money, profert, &c. 66, 67: by assignee of the mortgagee of a ship against the mortgagor for mortgage money and insurance, 67, 71. Plea, the mortgage contained a cov-

5 Wentw. 66  
&c. forms  
referred to,  
of pleas, dec-  
larations, &c

CH. 113. enant that after failure to pay the money at the day, mortgagee might enter, was a failure, and he entered and thereby released the debts., 81, replication, did not enter and issue, 82. Plea, damages released, 82. Covenant, mortgagee against two of the mortgagors for not paying mortgage money, 98, 100. Sundry references to declarations and pleas in several books, 100 to 145.

## CHAPTER CXIII.

### BARGAIN AND SALE. PARTITION BY DEED.

#### ART. 1. *Bargain and sale.*

2 Bl. Com. 338.—1. Saund. 251, 256, 275.—2 Saund. 11.—3 East, 546.—8 D. & E. 573.—Com. D. Bargain & Sale B 12.—1 Mod. 263.—Mod. 262; law of uses & trusts, 285.—4 Cruise, 173 to 180; does not divest any estate, 184, 194.—Yelv. 213.—Moore, 641, Atkins v. Longvill.—4 Cruise, 174, 175.—Cro. Jam. 60; hence a corporation cannot bargain & sell.—4 Cruise, 175; a seizin in equity is good, 177.

§ 1. It is necessary to add but a few words as to *bargain and sale*, as strictly speaking we have no such conveyance on our statutes, and we have but imperfectly adopted even the principles of this species of conveyance in England. But our statutes and pleadings often mention deeds of bargain and sale, and often call our statute deed by that name. This expression is vaguely used in the English and our law. The English books speak of a deed of bargain and sale for a term of years; and in the conveyance by lease and release, the lease for a year is frequently mentioned as a bargain and sale. Our deed is not properly a bargain and sale, or a contract for a money consideration as essential to convey lands, so that the bargainor becomes seized to the use of the bargainee, except where one conveys to another to the use of a third person, on the statute of uses, and then only raises a use, and that statute passes the possession. In this view this species of conveyance will be noticed in conveyances to uses. Regularly "no person that cannot be seized to a use, can pass land by way of bargain and sale; for it only passes a use at common law." "Though the possession and use pass both together, *tanquam uno statu*, yet there must be a seizin to a use in every bargain and sale, else there could be no execution by force of the statute; yet every body that comes in by bargain and sale, comes in by the statute." But a deed "may amount to a covenant to stand seized, or an exchange, but not to a bargain and sale, without a consideration of money." But according to Gilbert, a use is "an equitable right to take the profits of an estate, and extends to all who come in privity to the use."

And by 4 Cruise, 176, remainders &c. may pass by bargain and sale. CH. 113.  
Art. 1.

§ 2. A use in a bargain and sale cannot be limited but to the bargainee; for he cannot be seized to any use but his own; the bargain and sale vests a use in him, and the statute annexes the estate to the use; but to raise and so vest it there must be a consideration. See Lease and Use. 3 Johns. R.  
388, Jackson  
v. Meyer.—4  
Cruise, 194,  
335, 337.

§ 3. A gives this writing to B, to wit: "This is to certify that I have bargained and sold half of lot H, for \$2 per acre, to B, the interest to commence the July 1, 1792." This is no bargain and sale, but a mere agreement to convey; nor is it a lease. The words, "value received," in a deed, import a sufficient consideration to raise a use to the bargainee; and the words, "make over and grant," will convey lands by way of use. Hence if A by deed express *for value received* of B, he *makes over and grants* to B black-acre, this is sufficient to raise a use in B, and then to this the statute of uses insures the possession. 3 Johns. R.  
424, Jackson  
v. Clark.—3  
Johns. R. 484,  
495, Jackson  
v. Alexander.

This cause was decided, three judges against two. Spencer J. thought the words, *value received*, did not sufficiently express a money consideration, he deemed essential in a deed of bargain and sale: cited Mildmay's case, 1 Co. 176, which considers the words for *divers good considerations* not sufficient: cited Leo. 170; 2 Roll. Abr. 786; 2 Bl. Com. 296, Christian thinks a consideration necessary only in regard to a bargain and sale: cites Shep. Touch. 221; 3 Caines, 287, was as to a note: added 1 Lev. 170; Moore, 569, Fisher v Smith; 1 Mod. 262; 2 Mod. 249; 2 Stra. 1228; 1 Wils. 91: denied Bolton v. Carlisle to be law; 2 Hen. Bl. 261, in which it is said, the omitting to state the consideration of a bargain and sale, cannot be taken advantage of on a general demurrer.

Thompson J. of the same opinion; cited also 4 Cruise, 100, 124, 173, 178; 2 Inst. 671; 2 Bl. Com. D. 269; 2 Com. D. 6; 3 Com. D. 275, 227; 1 Bac. Abr. 496; Shep. Touch. 220; Willes, 675; Cro. El. 394, Ward v. Lambert, the same as Mildmay's case above, no *quid pro quo*; 5 Vin. Abr. 406, 507; 2 Mod. 253.

Kent C. J. thought the words, *for value received*, in the deed expressed a valuable and sufficient consideration to make it valid as a deed of bargain and sale, and observed, that at common law a feoffment or lease was valid without any consideration, in consequence of the tenant's homage &c.; "the law raised a consideration out of the tenure itself;" but after the statute of *quia emptores* a consideration became necessary; cited Perkins, sect. 528, 537. But the better opinion is, the notion of a consideration first came from the court of equity, as ne-

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Art. 2.



cessary to raise a use ; hence the courts of law adopted it in regard to bargains and sales. This new doctrine was much opposed ; cites 1 Plowden, 308, 309 ; Lord Bacon, his Works, Vol. 4, p. 167. The equity rule however prevailed, and the Chief Justice admitted a consideration is necessary in a deed to uses ; and held, the words, *for value received*, sufficient : cited 2 Vent. 35, for "*value received* is equivalent to saying money was received, or a chattel was received ;" notices Fisher v. Smith, saying if a deed express a *competent sum of money*, it is good : cites 2 Roll. Abr. 786, saying, "an averment that a bargain and sale was in consideration of money, or other valuable consideration, given was sufficient." Cited also 9 and 10 W. III. c. 17 ; 1 Show. 4 ; Carth. 5, Holt's opinion. Van Ness J., and Yates J., were of the same opinion.

§ 4. So the words, *remise, release, and forever quitclaim*, or the words, *release and assign*, in a deed are sufficient to raise a trust or use, so as to constitute a valid bargain and sale of lands : 2. If a valuable consideration, as cattle or lands, be proved, it is sufficient, though no consideration be expressed in the deed : 3. No particular form of words is necessary to raise a use : 4. And if words amount to a present contract of sale or bargain, a use is raised which the statute will transfer into possession. 10 Johns. R. 456, Jackson v. Fish & al.

See Ch. 134.  
—5 Wood's  
Con. 704,  
729.—If A &  
B exchange  
lands, & A's  
title to a part  
fails, the  
whole is void,  
5 Johns. R.  
55.—4 Co.  
121, Bus-  
tard's case ;  
this & parti-  
tion depend  
on an impli-  
ed condition.  
2 Bl. Com.  
324.—4  
Cruise, 143.

#### ART. 2. Partition.

§ 1. Partition is a form or mode of conveyance. And among some privies in estate, the deed of partition of one to another operates as a grant, among others as a release &c. Partition in our probate proceedings, and by action or petition, will be considered in another place ; only partition by deed will be noticed in this chapter. And as we have no statute respecting partition by deed, and the deed usually must have the ten essential parts above described, and also be signed, acknowledged, and registered by our statute law, and operate on the general principles that govern our deeds, little remains here to be said.

§ 2. According to Blackstone, partition is, where two or more joint-tenants, tenants in common, or parceners, agree to divide their lands, so held among them in severalty, each taking a distinct part. In all these cases there is a unity of possession, and in some cases a unity of interests. It is necessary they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. And in the deed each one or more, as the case may be, doth grant, bargain, sell, alien, release, and confirm unto, &c. Presumed after long possession in severalty. Ch. 94, a. 4, s. 3.

§ 3. For the effect of partition on petition against persons

unknown, see *Cook v. Allen*, Ch. 35, a. 10; and Ch. 104, a. 3. CH. 114.  
Art. 1.

§ 4. Parceners may make partition by consent, that one shall have the lands for so long a time, then the other for so long a time. So partition is by act in law, as if two parceners take husbands, have issue, and die, and they become tenants by the curtesy; they do not hold in parcenary; but partition is made between them by act of law. So if one parcener disseizes the other, they hold not in parcenary, till the disseizee re-enters or recovers.

*Co. Lit.* 167.  
—5 *Com. D.* 165.

§ 5. Since the statute of frauds it has been holden, that partition cannot be made by parol. And the law will not presume a deed of partition to have been made by tenants in common, merely from their several possessions. A release, when neither party to it have any possession, actual or legal, in the land released, passes nothing.

5 *Mass. R.* 235, *Porter v. Perkins & al.*  
—5 *Com. D.* 167.—*Willes*, 248.

## CHAPTER CXIV.

### CONVEYANCES TO USES AND IN TRUST.

#### ART. 1. *General principles.*

§ 1. There seems to be a common opinion that not much legal knowledge is necessary in conveying estates, and even in conveying the various interests carved out of them, or even in creating them in the different instruments used in conveyances. Perhaps enough will appear in this chapter alone to prove the absurdity of this opinion. This chapter necessarily embraces a very large portion of executory estates, in the conveyances or creation of which by deeds, writings, &c. the greatest attention to the accurate and legal use of words is necessary, as will appear in the sequel, and a thorough knowledge of their legal meaning. In these conveyances to uses and in trusts, are included covenants to stand seized to uses and in trust, and most other kinds of conveyances before described; deeds, also leading uses, and covenants to revoke uses, or to revoke and limit new ones; the various kinds of uses &c., as resulting, springing, shifting, and executory uses &c., uses and trusts, superstitious or charitable, &c. So the conveyances of remainders and reversions, and the numerous contingent and vested interests growing out of them, embrace

*Fearne* by *Powell* used in this chapter as more applicable to uses than *Fearne* by *Butler*, and his executory devises published in London 1796, sometimes called his second volume. Origin of, *Cruise on Uses*, 29, &c. —3 *Reeves' Hist. of the Law*, 174, &c. —*Bacon's Reading on the Stat. of Uses*, 19, 22, &c.

**CH. 114.** executory estates of various kinds ; in which conveyances, various uses and trusts, conditional fees, and shifting interests, are involved ; a mere sketch of which are included in this chapter. And it is more difficult to understand these intricate executory estates, and the conveyances and creation of them by deeds &c., in America than in England ; because there exists a system founded on the principles of the common law, and statutes long since in use and explained ; this system we study, but have varied it, and much perplexed it by our modern, and as yet unexplained statutes, affecting executory and other estates. Only principles can be considered as in regard to these executory estates generally ; there can be no set forms :—and now the best rule is, to construe conveyances to uses as such at common law. 4 Cruise, 426, 428.

Trusts &c.,  
Sugden, 448,  
purchases in  
the name of  
third persons  
in trust &c.—  
10 Ves. jr.  
360.  
16 Johns. 199.

§ 2. As uses and trusts are interests in or out of lands, they must, by our statutes, be created and passed by writing ; and if for more than seven years, by deed signed, sealed, acknowledged, and recorded, except where they pass by descent, or are raised by construction or implication of law.

§ 3. It has been stated by English writers that the English clergy derived uses from the civil law. 5 Bac. Abr. 344 ; 1 Cruise, 393.

L. Uses, 3—  
means Gil-  
bert's Law of  
Uses and  
Trusts.—A  
use not an  
object of ten-  
ure, 1 Cruise,  
411, 412.—  
3 Bin. 306.—  
Cruise on  
Uses, 29.

§ 4. There can be no doubt but that the statute of uses, 27 H. VIII. c. 10, has been adopted in this State, though not practised upon in numerous instances ; yet it has been here in use from the first settlement of the country ; and lands have been conveyed to one to the use of, or in trust for another. Our deed to uses has differed from our common deeds, but in a few clauses ; A, for instance, has, for a sum of money paid him by B, given, granted, bargained, sold, conveyed, and confirmed, to him, certain described premises with the appurtenances, to have and to hold the same to him, his heirs, and assigns, to the use of A and his wife, and their heirs and assigns forever ; or to the use of D for life, remainder to the use of E, and his heirs and assigns, forever, according as the estate is meant to be disposed of ; some have added, *and to no other use or purpose whatever.*

1 Bl. Com.  
372.  
2 Bl. Com.  
336, 337.—2  
Vern. 659.—  
Co. L. 2.—  
Use in the  
civil law, see  
Just. Inst. lib.  
2, tit. 23, s.  
1.—2 Lev.—  
at common  
law.

§ 5. And our deed in trust, to prevent the statute of uses annexing the possession to the use, has been in common form, except the estate has been conveyed to A and his heirs, in trust, to receive and pay over the profits of the same estate to B, to her sole use and disposal. Sometimes A, for the love and affection he has for his nephew B, and one dollar paid him by C, doth give, grant, sell, and convey, to the said C, his heirs, and assigns, upon the trust and confidence neverthe-

Uses not objects of tenure, Bac. on Uses, 29, it being no estate in the land

less to receive the rents and profits of the same estate, and yearly to apply them to the use and benefit of the said B during his minority, and until he arrives at the age of twenty-one years, and when and immediately after he shall arrive at the age of twenty-one then to hold the same estate to his use &c., and to convey to him &c. Here is a trust for a time, and then a use in the same conveyance. Or the estate may be conveyed to B in trust to permit C, the *cestui qui trust*, to take the profits. See art. 13.

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Art. 2.

2 Bl. Com.—  
2 Vent. 312.  
—6 Com. D.  
434.

§ 6. *In our covenant to stand seized.* A, for instance, for a proper consideration, “doth for himself and his heirs covenant, grant, and agree, to and with the said B, (trustee,) and his heirs, that he, the said A, and his heirs, will stand and be seized of and in, (the land,) to and for the uses, intents, and purposes following, and to no other, that is to say, to the use of the said A for the term of his life, and after his death to the use of T, his wife, for her life, and after her death, and the death of the said A, to the use of G, their eldest son, &c. &c. And in the same deed A may reserve a power, by deed, to revoke, alter, or change, any of the said uses, and to appoint new ones, or reserve a power to alter a part &c. See powers as to estate, Ch. 130, a. 6.

§ 7. The old common law knew no use; nor was a use mentioned till the reign of Richard II.; but by the ancient common law the use was viewed as included in the land itself. Uses became general in the reign of the third Richard. The *cestui que use* could have no estate at common law, as by it no estate in seisin could pass but by livery and seisin, and this was created merely by parol. Bac. on Uses, 15, 17.

3 Salk. 384.  
—6 Com. D.  
427.—2  
Ferne, 288,  
289.—1  
Cruise, 392,

ART. 2. *Use or trust what.*

§ 1. A use is a right to take the profits, distinct from the legal estate, or estate of the lands, at common law, “a use is an equitable right to have the profits of lands, the legal estate whereof is in the feoffee according to the trust and confidence reposed in him.” Every use was in *esse*, as in *possession*, *remainder*, or *reversion*, or in *contingency*, to come into *esse* on a *contingent* event. Bac. R. 9.

Gilb. Law of  
Uses & Trusts,  
175.—5 Bac.  
Abr. 342.—1  
Co. 121.—2  
Bl. Com. 327.  
—1 Cruise,  
401 to 404

§ 2. Uses and trusts in their origin were exactly the same, somewhat similar to the *fidei commissum* of the Civil law, where the testator gave estate to one in confidence to convey it, or to dispose of the profits of it at the will of another. As where a feoffment was made to A and his heirs, to the use (or in trust) for B and his heirs; “here at the common law A, the *tertenant*, had the legal property and possession of the land, but B, the *cestui que use*, was in conscience and equity to have the profits and disposal of it.” Confidence in the privity in estate, expressed or implied, were essential to every

CH. 114. use ; this means the common law for two or three centuries  
 Art. 2. before the statute of uses. If a power of appointment be given,  
 a power of revocation is so. Cowp. 651 ; 3 East, 410 ; Bac.  
 on Uses, 4 &c. ; Doct. & Stud. 171 ; 1 Co. 121.

Fearne, 288. § 3. *Trusts, what.* Trusts now are exactly what uses were  
 1 Cruise, 459. at common law ; " exactly of the same nature as uses were : "  
 —are governed nearly by the same rules, and are subject to  
 every charge in equity which the legal ownership is subject to  
 at law ; a trust is but a new name given to use, and invented  
 to defraud the statute of uses, which was intended to destroy  
 that double property in land that had been introduced by the  
 invention of uses. 1 Cruise, 458 ; Vaughan, 50 ; 1 Atk. 591.

See Stat. 50, § 4. The first statute as to uses we need notice was, first  
 Ed. III.— of Richard III. c. 1, which enacted, " that every estate, feoff-  
 1 H. VII.— ment, gift, release, grant, leases, and confirmations of lands,  
 1 Rich. III. c. tenements, rents, services, or hereditaments, made, had, or here-  
 1. A. D. after to be made or had, by any person or persons, being of  
 1463. full age or whole mind, at large and not in duress, to any per-  
 son or persons, and all recoveries and executions had or made,  
 shall be good and effectual to him to whom it is so made, had,  
 or given, and to all other to his use, against the seller, feoffor,  
 donor, or grantor thereof, and against the sellers, feoffors, do-  
 nors or grantors, his or their heirs, claiming the same only as  
 heir or heirs to the same sellers, feoffors, donors, or grantors,  
 any or every of them, and against all others having or claim-  
 ing any title or interest in the same only to the use of the  
 same seller, feoffor, donor, or grantor, sellers, feoffors, donors,  
 grantors, or his or their said heirs at the time of the bargain,  
 sale, covenant, gift or grant made, saving to every person or  
 persons, such right, title, action, or interest by reason of any  
 gift *in tail* thereof made, as they ought to have had if this act  
 had not been made." By this act, conveyances to one or to  
 another to his use, are good and valid against the seller, feof-  
 fer, &c. and those claiming to his use.

19 H. VII. c. § 5. By this act of H. VII. the lands were made liable for  
 15.—Gilb. the debts of the *cestui que use*. The act of Richard III. author-  
 Law of Uses, ized the *cestui que use* to alien only when he had a use in *esse* ;  
 27.—Plow. but when he had a naked right to a use, he might extinguish  
 351. it by his release or by his disseizin and feoffment.

Gilb. Law of A use cannot be to an alien, but he retains it till a decree  
 Uses, 43, 44. is had in chancery ; but a trust may be to an alien, so in this  
 a use is altered.

2 Fearne, § 6. At law the *cestui que use* had no action for his use or  
 288. " Ori- the profits, and he had no remedy but in Chancery, and at first  
 ginally the the remedy was extended only to the very person intrusted  
 words use and for the *cestui que use*. In the time of Henry IV. it was ex-  
 trust were tending to be  
 perfectly sy- 1 Cruise, 458. Purchases by trustees.—Sugden, 422 to 436, &c. art. 16.  
 nonymous."

tended to his heir, and afterwards to such alienees as had purchased without valuable consideration, or with notice of the uses : but a purchaser for a valuable consideration without notice might hold the land discharged of any trust or confidence. But by the statute the estate and possession are so fully transferred to *cestui que use*, that he may have trespass before entry against a stranger. This statute is of so much importance in the United States, that all the material parts of it ought to be cited at large.

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Art. 3.

Cro. El. 46.

ART. 3. *Statute of uses.* § 1. This act recites the evils arising from secret uses and trusts, and enacts, "that where any person or persons stand or be seized, or at any time hereafter shall happen to be seized, of and in any honours, castles, manors, lands, tenements, rents, services, reversions, remainders, or other hereditaments to the use, confidence, or trust of any other person or persons, or of any body politic, by reason of any bargain, sale, feoffment, fine, recovery, covenant, contract, agreement, will, or otherwise, by any manner of means whatever it be ; that in every such case, all and every such person or persons and bodies politic, that have or hereafter shall have any such use, confidence, or trust, in fee simple, fee tail, for term of life or years, or otherwise, or any use, confidence, or trust in remainder or reverter, shall from henceforth stand and be seized, deemed and adjudged in lawful seizin, estate and possession of and in the same honours, castles, manors, lands, tenements, rents, services, reversions, remainders, and hereditaments, with their appurtenances, to all intents, construction, and purposes in the law, of and in such like estate as they had or shall have in use or trust, or confidence of or in the same ; and that the estate, title, right, and possession, that was in such person or persons, that were, or hereafter shall be seized of any lands, tenements, or hereditaments, to the use, confidence, or trust of any such person or persons, or of any body politic, be from henceforth clearly deemed and adjudged to be in him or them that have, or hereafter shall have such use, confidence, or trust, after such quality, manner, form, and condition as they had before in or to the use, confidence, or trust that was in them."

27 H. VIII.

10.

§ 2. "That where divers and many persons be, or hereafter shall happen to be jointly seized of and in any lands, tenements, rents, reversions, remainders, or other hereditaments, to the use, confidence, or trust of any of them that be so jointly seized, that in every such case that those person or persons which have or hereafter shall have any such use confidence, or trust in any such lands, tenements, rents, reversions, remainders, or hereditaments, shall from henceforth have and be deemed and adjudged to have only to him or

CH. 114. them, that have or hereafter shall have such use, confidence,  
 Art. 3. or trust, such estate, possession, and seizin of and in the same  
 lands, tenements, rents, reversions, remainders, and other  
 hereditaments, in like nature, manner, form, condition, and  
 course as he or they had before in the use, confidence, or trust  
 of the same lands, tenements, or hereditaments."

§ 3. *Jointure &c.* "That whereas divers persons have purchased, or have estates made and conveyed of and in divers lands, tenements, and hereditaments unto them and their wives, and to the heirs of the husband, or to the husband and to the wife, and to the heirs of their two bodies begotten, or to the heirs of one of their bodies begotten, or to the husband and to the wife for the term of their lives, or for term of life of the said wife; or where any such estate or purchase of any lands, tenements, or hereditaments hath been or hereafter shall be made to any husband to his wife, in manner and form above expressed, or to any other person or persons, and to their heirs or assigns, to the use and behoof of the said husband and wife or to the use of the wife; that then and in every such case, every woman married having such jointure, or hereafter to be made, shall not claim or have title to have any dower of the residue of the lands, tenements, or hereditaments that at any time were her said husband's by whom she hath any such jointure, nor shall demand or claim her dower of and against them that have the lands and inheritances of her said husband: but if she have no such jointure, then she shall be admitted and enabled to pursue, have, and demand her dower by writ or dower, after the due course and order of the common laws of the realm; this act or any law or provision made to the contrary notwithstanding; provided always, if any such woman be lawfully expelled or evicted from her said jointure, or from any part thereof, without any fraud or *covin* by lawful entry, action, or discontinuance of her husband; then every such woman shall be endowed of as much of the residue of her husband's tenements or hereditaments, whereof she was before dowable, as the same lands and tenements so evicted and expelled shall amount or extend unto." Provided also, if a jointure be made to the wife during the marriage, she may after the death of her husband accept it or demand her dower at her election, by writ of dower or otherwise, of and in all such lands, tenements, and hereditaments, as her husband was and stood seized of any estate of inheritance at any time during the coverture.

"That all and singular the person or persons and bodies politic, which shall have any estate unto them executed of and in any lands, tenements, or hereditaments, by authority of this act, shall and may have, and take the same or like advantage,

benefit, or voucher, aid-prayer, remedy, commodity, and profits by action, entry, condition, or otherwise, to all intents, constructions, and purposes, as the person or persons seized to their use of or in any such lands, tenements, or hereditaments so executed, had, should, or ought to have had at the time of the execution of the estate thereof by the authority of this act, against any other person or persons, of or for any waste, disseizin, trespass, condition broken, or any other offence, cause, or thing concerning or touching the said lands or tenements so executed by authority of this act." The third clause in this act prevents former estates merging, and terms for years. 1 Cruise, 266.

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Art. 4.

It will be observed, that this act speaks only of one seized to the use, confidence, or in trust for another. So that it does not respect a leasehold estate, or any estate less than a freehold, of which lesser estate a man can be only possessed and not seized. But by the same act this seizin respects services, rents, reversions, remainders, and other hereditaments. 1 Cruise, 428, 429.

Bac. on Uses,  
38, 46.

Thus by statute the estate of *cestui que use*, became the legal estate subject to the same rules of law, to dower, to curtesy, to be forfeited, and the estate of the feoffee became annihilated. 1 Cruise, 407, 408.

Law of Uses,  
43, 44.—2 Bl.  
Com. 333.

§ 4. "There is no difference between estates conveyed by way of use and by way of possession." A use descends by the rules of the common law. To turn a use into an estate by this act: 1. There must be a person seized to a use: 2. A *cestui que use in esse* and ascertained: 3. A use in *esse*, in possession, remainder, or reversion: 4. Transferring to the *cestui que use* the estate to which the use is collateral, and annexed in privity to the estate of the land, and to the person who had the estate, though not issuing out of the land. What estate is a trust and not a use; see *Venable v. Morris*, cited Ch. 125, a. 5, s. 54; 1 Cruise, 408, 460, and *Hopkins v. Hopkins*, a. 22, s. 19; Bac. on Uses, 45, 46.

3 Salk. 384.—  
2 Bl. Com.  
330.—2  
Fearn, 288.  
—1 Cruise,  
422 to 434.—  
1 Co. 121,  
Chudleigh's  
case.—Co. L.  
272.

ART. 4. *Who can be seized to use or not.*

§ 1. "A tenant by the curtesy, or tenant in dower, cannot be seized to uses, because they come to their estate by the disposition of the law." So the lord by *escheat*. A corporation aggregate might hold the land, but was not compellable to execute the trust. Such corporation can purchase only for the ends of its creation, and as authorized by the statutes creating it. Minors, and others not having a disposing power, cannot raise a use in *pais*; nor one coming to a different estate. Bac. on Uses, 21.

Law of Uses  
& Trusts, 171.  
—1 Cruise,  
407.—2 Bl.  
Com. 330.—  
1 Co. 122.—  
1 Cruise, 406,  
422, 424.—  
Law of Uses,  
39.

§ 2. So a disseizor, an abator, or an intruder, cannot be

5 Bac. Abr.  
364.—1 Co.  
Com. 78.

122, 139.—Law of Uses, 39, 10, 11, 171.—Co. Lit. 19.—2

CH. 114. seized to a use, because they take the estate under no trust,  
*Art. 4.* nor by any agreement or contract, essential to every trust, but they defeat the estate to which the trust was subjoined. Nor can a tenant in tail be seized to a use; for by the statute *de donis*, he has the estate to his own use. But *quære*, and see 1 Cruise, 424 to 428; on Uses, 49, 53. Nor can an alien be seized to a use; but a minor may be seized to uses. 1 Cruise, 407, 422.

2 Cro. 400,  
 401.—6 Com.  
 D 436.—1  
 Co. 133.—3  
 Salk. 386.—  
 Cro. Car. 231.  
 —3 Burr.  
 1898.

§ 3. Feoffees to uses now have no estate at all, but in respect of contingent estates, and uses limited in the deed, not for want of a capacity, but because the statute immediately transfers their estate to him who has the use. And trustees now shall not recover possession from their *cestui que trust*. Ch. 114, a. 16, s. 1. To create a use, confidence in the trustee and privity of estate are essential. Bac. on Uses, 18.

2 Bl. Com.  
 330; Law of  
 Uses, 281.—1  
 Cruise, 408,  
 424, 426.—  
 Bac. on Uses,  
 24, &c. 48,  
 &c. 55.

§ 4. *What may be granted to use.* It is well settled, that nothing can be granted to a use, whereof the use is inseparable from the possession, as annuities, ways, and commons, and authorities, which by the use itself are consumed, and whereof seizin could not be instantly given; as where the use and possession are inseparable, the use can never be in one person and the possession in another.

Cro. El. 402,  
 Yelverton v.  
 Yelverton.—  
 3 Bac. 370.—  
 Law of Uses,  
 116, 117.—  
 Noy, 19.—  
 Cruise on  
 Uses, 86,  
 Wood v. Reig-  
 nold.—  
 Cruise on  
 Uses, 173.

§ 5. Nor has a mortgagor any estate out of which a use can be raised. Nor can a use be raised out of lands one has not. As where the father, by indenture, covenanted, in consideration of natural affection, to stand seized of all the lands he had, "and which he afterwards should purchase," to the use of himself for life, and after to the use of his youngest son and his heirs," and afterwards he purchased lands and died: all the court held, that this covenant vested nothing in the youngest son in the after purchased lands, and one can no more raise a use out of lands he has not, than he can charge or grant such lands. And as to the mortgagor it was said, "he had not any estate or interest, when he covenanted to be seized, though he afterwards redeemed; but *quære* as to the mortgagor. But every covenant to stand seized supposes a *precedent seizin*, and a use cannot be raised out of a mere right. Has a mortgagor any seizin, or more than a right to redeem? No use can arise out of a chattel, nor out of a use, nor out of a bare right; but may out of rents or liberties. One not a party to a deed may take a use under it, and this was always alienable.

Bac. on Uses,  
 49.—3 Salk.  
 385, 386.—  
 Law of Uses,  
 117.—Cro.  
 J. 400.—  
 Cruise on  
 Uses, 55.—1  
 Cruise, 409.

2 Bl. Com.  
 330, 331.—  
 Law of Uses,  
 47, 207.  
 Bac. 266, 268.  
 —4 Cruise,  
 396, 399.—1

§ 6. *Consideration.* A use cannot be raised without a good consideration, expressly declared, averred, and proved; but in a covenant to stand seized, love and affection for his wife, brother, or sister, is a good consideration; and so for a Cruise, 406, 409.—Yelv. 61.—Cruise on Uses, 71, 87, 90.

brother's or son's wife ; and so love and affection for one child shall be extended to others ; but love and affection for a bastard child is not good ; nor for strangers, but only for relations. Hence if one covenant to stand seized to the use of A and B, *strangers*, and C, *his brother*, this is valid as to C, "and it is entirely in him ;" but void as to A and B, "because not privy to the consideration."

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Art. 5.

§ 7. Marriage is a valuable consideration ; and if A "covenant to stand seized to the use of his son and his wife whom he shall marry, this is good." The relationship between father and son is extended to the son's intended wife, or to the woman he shall marry. So if A, in consideration of £10 paid by B, infeoff one to the use of B and C, this conveyance raises a use to C as well as to B. And in every case to raise a use there must be a person "who stands or is seized." None necessary in a conveyance to uses.

3 Wood's  
Con. 608.—3  
Salk. 386.—  
Law of Uses,  
80.—6 Com.  
D. 438.—5  
Bac. 368.—4  
Reeves, 336.  
—4 Cruise,  
211.

§ 8. But no consideration is necessary in cases of feoffments, fines, or recoveries, which raise uses by transmutation of possession ; but in these cases the use must be declared. But no use arises on a bargain and sale, not changing the possession, without a money consideration or a valuable one ; nor on a covenant to stand seized, also not altering the possession, without consideration of blood, marriage, or money. Cruise on Uses, 87, &c.

12 Mod. 161,  
162.—1 Co.  
176, Mild-  
may's case.—  
5 Bac. Abr.  
368.—Law of  
Uses, 46, 52.  
Cro. El. 394.  
—Plow. 307,  
308, 309.

§ 9. The use is always in the grantor, who has the estate, unless otherwise expressed, or unless the grantee give a valuable consideration, that is the grantor in fee or in fee tail. Where there is a consideration paid there can be no use or trust resulting, as will appear in the cases of resulting trusts : and on a general consideration no use can be raised by covenant, proviso, or bargain and sale, as for divers good considerations, for the court cannot judge if such considerations be good or not, or if the bargainor has a *quid pro quo* ; but in such the bargainee may aver that money, or other consideration valuable was paid or given." The same rule holds in cases of covenants to stand seized, for in each case the person to take is certain, and such averment may well stand with the deed ; but otherwise if the person be uncertain. In the alienation of uses no technical words of limitation, as heirs &c., were necessary, for if a sufficient consideration was paid, the chancellor decreed the absolute property of the use to the purchaser. 1 Cruise, 410.

Law of Uses,  
46, 66.—5  
Bac. 369, 386.

1 Co. 176,  
Mildmay's  
case.

See 7 Johns.  
R. 341, 343.

ART. 5. *Modes of granting to uses.*

§ 1. In England there are three sorts of conveyances to uses : 1. By fine and common recovery, by these uses are raised by transmutation of possession ; this mode never has

2 Sid. 158,  
Heyns v. Vil-  
lars.—Plow.  
301.—1  
Cruise, 440,  
of the land at

441.—Willes, 676.—1 Vent. 137.—2 Vent. 150.—Only one seized & possessed at the time can convey to uses, Cro. El. 401.—Cruise on Uses, 71, 81, 111.

CH. 114. been used in this State : 2. Covenant to stand seized to uses :  
 Art. 5. and 3. By bargain and sale to uses. These two do not change  
 the possession. Both these ways of raising uses we have  
 adopted from early times. By bargain and sale no contingent  
 use can be supported. By the English law the bargainee, or  
 covenantee, cannot have the land for want of livery of seisin,  
 reason then vests the use in him, which is but a right in con-  
 science to have the profits ; but our deed, which passes the  
 estate to the grantee as before stated, as it respects the par-  
 ties to it, and their heirs, and even creditors and after pur-  
 chasers having notice of it, may well have a different effect,  
 that of the feoffment, changing the possession, even though this  
 deed be not recorded. In construing our statute deed, in this  
 respect, probably many nice questions will arise.

Law of Uses,  
 285.—The  
 statute never  
 operates  
 where the  
 grantee can  
 take the es-  
 tate at com-  
 mon law,  
 Cruise on  
 Uses, 58, 80,  
 81.—5 Wood's  
 Con. 249,  
 249.—Mod.  
 262.—2 Mod.  
 249 to 253,  
 Barker v.  
 Keat.

§ 2. In the English bargain and sale, only a use passes at  
 common law, and the estate and possession by the statute.  
 The statute may operate whenever a use is raised ; the point  
 is then to raise the use. To do this, the person to be seized  
 to a use, must be such an one as can be so seized, as above,  
 of an estate out of which a use can be raised, on a proper  
 consideration. And by this mode of bargain and sale it seems  
 to be settled, that no consideration but money will do, " for  
 nothing else will make a bargain and sale : " but valuable  
 property may be as money ; hence " lands let for a year, re-  
 serving a peppercorn, if demanded, is a good bargain and  
 sale," and raises a use. This principle is supported by many  
 authorities cited in this case.

Law of Uses,  
 287, 288, 289.  
 —1 Inst. 672.  
 8 Co. 94.—1  
 Co. 126.—  
 Cro. E. 166.  
 —Dyer, 169,  
 229.—Cro.  
 Car. 218, 400.  
 —Hob. 136,  
 189.—1  
 Cruise, 440,  
 441, 442.—  
 Cruise on  
 Uses, 81, &c.

§ 3. In making the lease for a year, the usual consideration  
 was 5s., or some other small sum, to make it a bargain and  
 sale, on which the statute operated, and passed the possession,  
 and made the lessee capable of a release without actual entry  
 by the lessee, though not of having " an action of trespass  
 without entry, p. 251. And a bargain and sale may also "   
 amount to a covenant to stand seized, or an exchange. " The  
 words, *bargain and sell*, are not necessary to make a *bargain  
 and sale* within the statute ; but any words, at common law,  
 that upon a valuable consideration would have raised a use,  
 will be sufficient to create a bargain and sale within the stat-  
 ute ; " " but then it seems the valuable consideration must be  
 money ; so that if a man for money covenants to stand seiz-  
 ed, or aliens or demises, grants or to farm lets, these words, if  
 the deed be indented and enrolled, amount to make a bargain and  
 sale." " And if the money be paid but by one, it is sufficient, and  
 shall make the estate pass to all, if no consideration be ex-  
 pressed ; yet if it be averred that there was one paid, it is  
 sufficient ; but if a consideration be expressed, and be ac-  
 knowledged to be received, though in truth none was paid,  
 yet the party and his heirs are estopped from saying there was

none paid." But by the statute the deed is ineffectual to pass the estate till it is enrolled; but when enrolled in season, as between the bargainor and bargainee, it passes the estate from the delivery: before this act "the use and possession passed presently, both together, *tantum uno statu*, upon the delivery of the deed; but this statute requiring another ceremony, or circumstance, till that be had the deed is of no effect; and when it is had this statute is satisfied; and the use and possession are said to pass both together, by relation from the delivery of the deed, by virtue of the former law, this last not abolishing it, but only adding another circumstance to it, and then leaves the former law to its operation." And by this relation, if the bargainee die before enrolment, the estate descends to his heir:—and on a bargain and sale of land no use may be declared or averred, but what the law makes:—and words of bargain and sale &c. may be construed a covenant to stand seized. 2 West. 22. And one in consideration of marriage of his daughter to A, did give, grant, enfeof, alien, and confirm to them, and their assigns, to the use of the said daughter &c.; and the court did resolve, that this deed was not a bargain and sale, for want of a money consideration; not a release, as there was no lease for a year, nor the grantee in possession; nor a feoffment, as there was no livery of seizin, but a covenant to stand seized. And so 2 Wils. 75, *Roe v. Tranmer*, the court held, that a lease and release conveying a *freehold in futuro*, being void as such, was a covenant to stand seized. A use must be by deed or matter of record.

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Art. 6.

1 Johns. Ca.  
69,—7 Co. 40.  
—2 Wms  
Saund. 97.—  
Law of Uses,  
56.

ART. 6. *Quality of uses.* § 1. At common law the quality of a use was: 1. It had a separate existence from the legal estate: 2. It rested on a consideration: 3. It descended as an inheritance in possession: 4. It was assignable by will or secret deed; for the legal estate to which livery of seizin appertained remained in the feoffee: 5. Uses were not subject to any feudal burdens: 6. Nor to dower or curtesy: 7. Nor to be extended for the *cestui que use's* debt, for that the law viewed the feoffee as seized, and looked only to the person actually seized of the land: 8. Nor was a use assets: 9. Nor forfeitable. The *cestui que use* had neither *jus in re*, nor *ad rem*; nor any remedy against his feoffee, but by *subpœna* in chancery; and even this remedy commenced in the time of Edward III. about A. D. 1350, but was not allowed the feoffee of the feoffee till about the time of Henry IV.

2 Bl. Com.  
330, 331.—  
Hob. 31.—  
Law of Uses,  
25.—5 Bac.  
Abr 345.—  
1 Co. 123.—  
Plow. 349,  
351, 352.—  
1 Cruise, 412,  
413, 414.

§ 2. *The statute turned uses into trusts.* As it has been settled, that the act extends not to one possessed, nor to one who takes the estate in trust for another, to receive and pay over the profits to him, or to permit him to take the profits,

2 Bl. Com.  
327.—Law of  
Uses, 5, 26,  
27.—5 Bac.  
Abr. 355.

CH. 114. it has done little more than turn uses into trusts, and vary the words of the conveyance ; and as it speaks only of persons, it

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If a use be granted for a longer time than the estate out of which it arises, it ends when the estate ends. Cruise on Uses, 54, 96, 97. Law of Uses, 26, 27.—Flow. 349.—5 Bac. 347. Law of Uses, 17, 18.—5 Bac. 356.—Cro. El. 478.

extends not to corporations. But now trusts generally answer all the beneficial purposes of uses ; the trustee is a mere instrument of conveyance, and cannot affect the estate, but by a sale for a valuable consideration without notice, as the feoffee might ; the trust will descend, may be alienated ; is liable to debts, to forfeitures, to leases, to curtesy ; but not to dower or escheat. *Cestui que trust* is what *cestui que use* was before the statute of uses. “ At common law the *cestui que use* might alien the use ; because every one may dispose of the rights that are in him ;” “ or he may prefer a bill in chancery to make the *tertenant* execute the use in himself.” So may the *cestui que trust* now. By Richard III. c. 1, he might alien if he had the use in *esse* ; the use might descend or be devised, and by the 19 H. VII. c. 15, the lands might be taken for his debts. Before the statute of uses, the word *heirs* was not necessary to create an inheritance in a use, but it is since that act.

Fearne, 28, 34, 35, 57.—8 Co. 96.—10 Co. 47.

§ 3. There is no difference between a devise of the land and of the use, or of the occupation, or of the profits. Nor in chancery between the devise of the goods, or the use of the goods for life ; for devised either way, the first taker can have only the use with a remainder over. Conveyances on the statute of uses must have words of limitation. 1 Cruise, 436.

5 Bac. Abr. 361, 362.—1 Cruise, 442.—4 Cruise, 206.—Law of Uses, 6, 7.—Cruise on Uses, 125, 134.—5 Bac. 563. 2 Co. 58, case of Beckwith.—Bacon on Uses, 356.—Law of Uses, 71.

ART. 7. *When uses may be raised or revoked.* § 1. Uses and trusts may be declared after making the assurance. If a use be expressed in the deed or instrument, there can be no averment to the contrary ; but if no use be expressed in it, then other uses than what the law would make, may be averred. A deed of uses before a recovery may be explained by one after it. And generally, every man may raise a use according to his estate and interest in the land : and if by a minor on a feoffment he cannot avoid it, without first avoiding the conveyance ; as on a feoffment he on the land actually passes the estate by livery of seizin. Use by disseizin is where the disseizin is made to the use of two men, and one agrees at one time, and the other at another time, they are joint-tenants. By uses at common law is not usually intended the very ancient common law, but that which existed after the ecclesiastics &c. introduced uses.

Law of Uses, 140, 146.—Co. Lit. 237.—1 Cruise, 411.—3 Ch. Ca. 66.—Bac. on Uses, 28.

§ 2. *Revocation of uses.* Generally a power may be revoked any time before it is executed. “ Where an estate passes by way of use, executed by the 27 H. VIII. a power to revoke the use, and so the estate, has been allowed to be good ; as if a man covenant to stand seized to the use of himself for life, and after to the use of his son in tail &c., pro-

vided that he may revoke any of the said uses, and afterwards revokes them, he is seized in fee again, without entry or claim,—and may revoke one part at one time and a part at another time.” But if he make a feoffment as to part, he extinguishes his power as to that part. But if one covenant to stand seized to uses, and reserve power to revoke, and appoint other uses generally, to any body of his blood or strangers, the reservation is void; for the persons to take being uncertain, and the interest general, there is no consideration as to them.

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Art. 8.

1 Co. 176,  
Mildmay's  
case.

A power only to revoke does not enable the party to appoint new uses; and a power to revoke once exercised is gone. Some cases however otherwise.

3 Salk. 316.

A power of revocation: 1. Relates to the land, and is limited to one having an interest in it, and while he has it; see Hard. 43, 415: 2. In *gross*,—and is where one has an estate and power to revoke, and its execution is not within the compass of the estate; but where such a power is to be executed out of the remainders, and he by fine or feoffment disposes of the whole estate, his power is gone; Hard. 416; 10 Co. 48: 3. This power of revocation is also collateral, and is where one has no present interest in the lands, and by the revocation of the estate is to have nothing. In this case a fine or feoffment of the lands does not extinguish his power. Hard. 415.

Law of Uses,  
140 to 146.

ART. 8. *Resulting, springing, and shifting uses.*

§ 1. Resulting uses, as before mentioned, are whenever no use is declared or consideration expressed that raises a use in the grantee &c., the use is to the grantor. As if A enfeoff B without consideration, and express no use, the law intends the feoffment to be to the use of the feoffor and his heirs. For there must be a use to some one, and where none is declared for the feoffee, and he pays no consideration to entitle him to the use, there is no reason for his having it, and the grantor ought to have it, and retain it till he receives a *quid pro quo*, or consideration for it, or declares it is another's. But if a use to the grantee be expressed, it is sufficient, though without consideration, in a feoffment or other transmutation of possession. And here is the difference between raising uses by such change of possession, and uses by covenant to stand seized. “For if upon the first no uses were expressed, it is equity that assigns the feoffor to have the use; for by the law the feoffor has parted with all his interest; but where he expresses uses, there can be no equity in giving him the use against his own will; and there can be no presumption that the conveyance was to the use of the feoffor against his own declaration. But in case of a covenant, it is equity that must give the use; for the person can have no right by law, and

5 Bac. Abr.  
386.—Law of  
Uses, 222,  
223.—Moor.  
108.—2 Salk.  
675.—4 Mod.  
153, 156.—  
1 Cruise, 410,  
412. No use  
results in the  
case of a  
lease and re-  
lease, and no  
declaration.  
1 Cruise, 445.  
—2 W. Bl.  
687, Wills v.  
Palmer.—4  
Mod. 380,  
Tippin v.  
Coson. One  
cannot limit  
to himself a  
use he has  
by law; Cro.  
El. 321, Read  
& al. v. Er-  
rington;  
so has no re-  
sulting use.

**CH. 114.** therefore in such case there can be no use without a consideration, for there is no equity there should." The estate remains in the covenantor, and the use in reason and equity, remains with it in him, till the use is carried from him to the covenantee by some good consideration paid for it. See Resulting Trusts, a. 14, s. 3, &c.; Cruise on Uses, 198.

**Art. 8.**

2 Wils. 19.—  
Dyer, 166.—  
1 Mod. 182.  
Cleres' case,  
a. 9, s. 11.—  
Cruise on  
Uses, 148,  
162, 170, 194.  
—2 Co. 58.—  
6 Co. 17.

§ 3. So a use that cannot vest in him to whom it is limited, returns to the feoffor &c., or he never parts with it. So a use not declared accompanies the legal estate, or the consideration that draws it to it; and where no consideration appears, it goes with such estate of common right. As where A and B join in a recovery, and B has no interest, and no use is limited, this recovery is to A's use alone, who owned the estate. 2 Vern. 270, *Penkay v. Hurril*.

2 Co. 58,  
Beckwith's  
case.—Cowp.  
13, Moore's  
case.

§ 4. So if A, tenant for life, and B, in remainder or reversion, levy a fine generally, the use results to A for life, remainder or reversion to B in fee; and if no use be declared, the estate must result to the heirs of the grantor. But Douglas, 24, says, when no uses are declared, *parol* evidence may rebut the resulting uses.

1 Cruise, 443.  
Law of Uses,  
7.

§ 5. So if a man take a grant, knowing the uses and trusts, he takes it subject to them. So that if a feoffee to use, enfeoff B in fee, on a valuable consideration with notice, the second feoffee is seized to the former uses; for though the consideration imports a seizin to his own use, yet the notice implies a seizin to the former uses. "And where an act is capable of a double interpretation, that must be taken which consists most with equity;" "the reason is, it argues a corrupt conscience to bargain for an estate which the purchaser knows to be another's in equity; therefore, a consideration or no consideration is an issue at law; so notice or no notice, is an issue in chancery." But it seems in this case, if a use be expressed to the purchaser, he has it, and the notice is not material. The act is no longer doubtful; and therefore, as before stated, the second feoffee does not take to the former uses, unless he purchase both with notice and without valuable consideration, a use to him being expressed. No use can result or be implied against the intent of the parties, but remains in those having the legal estate. Dyer, 166, s. 9; as when they are to answer certain purposes. 1 Cruise, 448, 449, &c. *Winnington's case*; *Gilb. R.* 16.

Ld. Bacon on  
Uses.

1 Co. 114 to  
141, Chud-  
leigh's case.  
—3 Co. 81.—  
6 Com. D.  
424.—1 Co.  
164.  
22 Ed. IV. 18.

§ 6. There is no resulting use in any case where a man takes upon a valuable consideration, and without notice; therefore, if A enfeoff B on such consideration, and without notice, he is seized to his own use, for this act can bear no other construction. If A covenant to be seized after his death, he has the use for his life by implication. *Bac. on Uses*, 14, 18, 19, 20.

§ 7. And if feoffee to use, devise the land to A, he is seized to his own use, if not otherwise expressed ; for here is a consideration implied in the devise, and no use results to the former *cestui que use*. There is the same rule as to a gift in tail ; nor is there any use by implication of law but to the original owner. Cruise, 202 ; 5 Bac. Abr. 387, 388 ; 1 Salk. 162 ; 1 Cruise, 456 ; 6 Com. D. 434 ; 1 Cruise, 450, 454.

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§ 8. So the use follows the nature of the land ; as if land be in *gavelkind* the use thus follows ; so of borough English. So a use to rise on a contingency, in the mean time is in the feoffor. As if one enfeoff to the use of his will, or to the use of such as he shall name in his will, the feoffees in the mean time are seized to the use of the feoffor and his heirs. So to the use of A for life, the use of the fee is to the feoffor. No use results against the intentions of the parties, nor any inconsistent with the estate limited. 1 Cruise, 447.

6 Com. D.  
433.—Co.  
L. 271.

1 Cruise, 448.

§ 9. If a feoffment be to others, having notice of former uses, they are not seized to these uses if raised without consideration, or of that of blood only.

3 Co. 81,  
Twyne's  
case.

§ 10. Lands were devised to the wife and her heirs, to be sold for the payment of debts and legacies, in aid of the personal estate : and not being sold, and the personal estate being sufficient ; held, the heir should have the lands as a resulting trust. It has been much disputed if a use in fee simple result to a tenant in tail on his suffering a common recovery to turn his estate into a fee simple, and declaring no uses. Formerly it was held to be in tail and to the old uses on a feoffment, fine, or recovery, if without consideration or declaration of uses. Palm. 359, Waker v. Snow. But the rule has been altered in modern times ; because it has been of late understood, that resulting or implied uses are governed by the intentions of the parties : and whenever a tenant in tail suffers a recovery, and declares no uses, the fair presumption is, he means thereby to acquire a fee simple ; otherwise, he would not be at the expense and trouble if to have only the same estate he had before. Therefore, it is now held, that if he suffer a recovery without a declaration of uses, the resulting use is to him in fee simple ; or rather there is a new use in fee, acquired and implied from the circumstances of the case. Cruise on Uses, 125, Martin v. Strahan.

9 Mod. 122,  
Bugins v.  
Yates.—  
Latch, 82,  
Argol v. Che-  
ney.—  
9 Co. 11,  
Dowman's  
case.—3 P.  
W. 207,  
Nightingale  
v. Ferras.—  
5 D. & E. 107.

This doctrine of resulting or implied uses exists only where an estate in fee simple is conveyed, and not where an estate in tail for life or years is conveyed. In neither of these cases does any use result where there is no declaration of uses and consideration ; hence the donee in tail &c. will hold to his own use ; for by this kind of gift there is a tenure created between the donor and donee in tail, which amounts to a consideration,

Cruise on  
Uses, 267.—  
Dyer, 146.—  
Perk. s. 534.  
—Bro. Abr.  
Feoff. pl. 10.

CH. 114.  
Art. 8.

and prevents the use from resulting. On the same principle, if one lease land to another for life or years, no use will result to the lessor; so if the lessee for life or years grant over his estate and make no declaration of use, the grantee has it to his own use:—another reason is given by Gilbert, that is, that these lessor estates were not often by the usage of the country delivered over in trust to let the lessor take the profits; but were usually let for rents, and were subject to waste &c. And if an estate for life or years be conveyed without consideration, though a use be declared to the grantee of a part, yet there will be no resulting use:—so no use results on a devise or lease and release.

Cro. Jam.  
200, *Castle v.*  
*v. Dod.*

Dyer, 274,  
Mutton's  
case.—Cro.  
El. 439,  
Woodliff v.  
Drury.—Cro.  
El. 626,  
Wells v. Fin-  
ton.—2  
Ferne, 90.—  
—2 Bl. Com.  
334.—5 Bac.  
Abr. 374,  
Spring v.  
Cæsar.—  
Ferne, 275.  
—2 Cruise,  
352, 353, 358.

§ 11. *Springing and shifting uses.* A use may arise on a future contingency, if it happen in a reasonable time, and in the mean time the use is in the original grantor. As where A made a feoffment by indenture, and it was thereby declared to be to the use of himself and B, his wife that should be, after their marriage, and of the heirs of their bodies, and he married B; the court held, that A was seized in fee till the marriage, and by that the new use did arise, and vest in him and his wife in tail, there having been in the mean time no act to destroy that future use:—this use shifted. But in these cases the feoffee must remain seized till the use arises, and there must be no act in the mean time to destroy the estate, whereon the use depends. This differs from an executory devise, where the freehold itself is transferred to the future devisee; or rather, "it is a rule that wherever there is an executory devise of real estate, and the freehold is not in the mean time disposed of, the freehold and inheritance descends to the testator's heir at law." This is instead of the old doctrine of abeyance. 1 Cruise, 16, &c.

Ferne, 90.—  
Bac. on Uses,  
351.—2 Bl.  
Com. 336.—  
Ferne, 97,  
98.—Law of  
Uses, 77, 78.  
—1 Roll. R.  
137.—2 Bulstr.  
273.—Salk.  
675.—12  
Mod. 39.—  
2 Cruise, 356.  
Ld. Bacon on  
Uses, 351.—  
Cruise on  
Uses, 27, 162,  
170.

§ 12. So a use in fee may arise after a use in fee. So a part of a use may shift from one to another, as from a mother to her son on his birth. When a use expires or cannot vest, it results back to him who raised it. If a man make a feoffment in fee to the use of A in fee, but on paying £100, or other contingency to the use of B in fee, if the contingency happen, the fee shall be executed in B; though by the common law a fee cannot be limited on a fee, as a fee is of the whole estate and leaves no remainder. But chancery passed by this rule to favour commerce and family settlements as to uses, and the statute executes the possession as the use was; and that was a conditional fee in A. A man may make a conveyance to uses, and the use in *futuro* "shall change from one to another," on subsequent events, as it might before the statute of uses. Hence, if I limit a use jointly to two persons not in *esse*, and one is

born, he takes the entire use, then the other is born, he takes jointly with the former. CH. 114.  
Art. 9.

A. D. 1735, A seized in fee, devised to two trustees and their heirs in trust &c., to his son B for life, remainder to said trustees, during B's life to preserve contingent remainders, but to permit B to receive the rents and profits thereof during his life, remainder to his first and other sons in tail male; remainder to C, with a *proviso* that if B should succeed to the estate of D, the limitation of A's estate to B should cease; and the next in remainder should take as if B were dead. B so succeeded before he had a son, and after B's death it was held, that the limitation to the trustees continued during B's life, so as to support the contingent remainders, and the estate shifted to C. The same takes place in regard to contingent and shifting uses.

ART. 9. *Executory uses.* § 1. Among these are *springing, contingent, or secondary uses*. If a feoffment be made to J. S. in fee, to the use of A for life, remainder to his first, second, and third sons, and remainder to B in fee, there are three essentials to preserve the contingent use in remainder: 1. When it is executed there must be a person seized to the use: 2. The estate for life is immediately executed in A, the remainder in fee in B, by the 27 H. VIII., for so they have the use, and they have the possession in the same manner as they have the use by the statute: 3. No possession can be immediately executed in the three sons, because not in being, and so incapable of property in use or possession. The case is, the legal estate is executed in A and B, but when the contingency happens, the feoffee shall be deemed so seized as to let in the contingent use." But had A made a feoffment in fee, and then a son had been born, the contingent remainder had been destroyed; for the very freehold created when the contingent use in remainder was, must remain till that vests. It is a settled rule, that no estate shall pass by executory devise or springing use, where it can exist or pass as a remainder, vested or contingent; that is, where it can rest on a freehold created by the same conveyance, and there be no chasm between the freehold and contingent interest. The operation of the 27 of H. VIII. may wait till the use arises in the legal time; as if A enfeoff B and his heirs to his and their use, on condition he pay A £1000 in ten days, and if he fail, then to the use of A, the feoffor, for life, remainder to his son in tail; and the £1000 is not paid, the last uses are good, "for the condition is not annexed to the estate of the land, but to the future use only," and one estate ceases and another arises in legal time,—lives in being, twenty-one years and nine months after.

4 D. & E. 13,  
Doe v.  
Heneage.  
Same case,  
Fearne,  
100 to 108.—  
2 Cruise, 359.

Law of Uses,  
127 to 132.—  
5 Bac. Abr.  
179.—1 Co.  
114, 141,  
Chudleigh's  
case.—2  
Fearne, 86.—  
2 Cruise, 351.  
—4 Cruise,  
469. See  
Remainders.

2 Cruise, 369.  
—Dougl. 767,  
—Fearne,  
1 to 16, 20,  
21, 22.  
See art. 16, s.  
19, as to legal  
time.

CH. 114. § 2. So if one bargain and sell to the use of another five years hence, this is a good future or springing use. Per Holt Art. 9. C. J., 12 Mod. 39.

Moore's R. 99, Haswell v. Lucas, cited Fearn, 88, and 2 Cruise, 356.

§ 3. So where A enfeoffed two feoffees and their heirs to their use, on condition if A did not in fifteen days pay B or his assigns £10,000, then the feoffees to be seized to the use of B and his wife, remainder to their second son in tail, with divers remainders over. The money not being paid, it was held, that the feoffment was good, and passed the contingent use.

§ 4. See Woodliff v. Drury, ante, and Smith v. Warren, Cro. El. 688.

Fearn, 89, 90.—See Ch. 135, a. 5, s. 15.

§ 5. So covenant to stand seized to the use of himself for life, then to the use of his son and such wife as he should marry, and the heirs male of his body. The father, the covenantor, died, and afterwards the son took a wife. And it was adjudged by the court that she had a joint estate with her husband to them and the heirs male of his body: that the consideration of blood in the son, raised a use to her in *futuro*, for without a wife he could not have issue; and his estate supported a contingent remainder to her, till the marriage; and then his estate changed from an estate tail in him alone, to a joint estate by the 27 H. VIII. which vested the possession as the use was vested.

Fearn, 90 to 95, 318, 319.

§ 6. So a use to arise on a contingency in a life and twenty-one years after, or upon a use in fee, has been common since 27 H. VIII.; and in this respect of time may be well governed by the rules that govern executory devises. There can be no inconvenience in suspending the vesting of contingent or secondary uses, or shifting or springing trusts for as great a length of time as is allowed in regard to such devises. In all these cases of shifting executory interests, whether uses or estates, there is one simple principle. One use or estate ceases on some contingent event, and another begins; hence, there is no absurdity in a fee upon a fee, or more properly a fee after a fee, if the last vests in legal time.

See Ch. 135, a. 5, s. 15.

7 D. & E. 652, Horton v. Horton. 6 D. & E. 213.

§ 7. In this case A devised lands to trustees and their heirs upon trust, to permit a married woman to receive and take the rents and profits during her life, for her sole and separate use, and after her decease to the use of the first and other sons of her body, then to the daughters as tenants in common, with other similar limitations to other married women. This vests the legal estate by way of use executed in fee simple in the trustees.

1 Co. 129, 130, 137, Chudleigh's case.

§ 8. It is a settled rule, that in all cases of a contingent use in remainder, a sufficient estate must remain in the feoffees to preserve such future use when it comes in *esse*. Such estate is to this use what the prior freehold is to the contingent remainder.

§ 9. A devise to A and his heirs upon a contingency, the CH. 114.  
 devisor dies, the contingency happens after A's death, his heirs Art. 9.  
 shall take. So if a feoffment be to the use of A for life, remainder to B in fee, and A refuses, B's use begins immediately. So if the first use do not rise for want of a consideration &c.; but otherwise in a covenant to stand seized, in which each estate arises on its own consideration. As if A covenant to be seized to the use of B for life, and after his death in consideration of £100 to C in fee; if B refuse or his estate be void, C shall not have it till B's death:—so to the use of B till his age of twenty-one years, and after such age to A; if B die, A shall not take till B would have attained the age of twenty-one years. The distinction in these cases depends on the nature of the consideration.

Jones, 59.—  
 6 Com. D.  
 488—1 Co.  
 182, 154.

1 Co. 154.—  
 Leon. 195.

§ 10. If a feoffment be to the use of the right heirs of B, after his death, the use arises after to them, and in the interim to the feoffor; for the gift is future, and the contingency happens at the end of a life in being: but an estate does not arise by way of a springing use, after a death without issue. There may be a number of springing uses within twenty-one years after lives in being. And a use or trust not disposed of, remains to him who creates it as a legal estate does.

1 Salk. 225,  
 in Lamb v.  
 Archer.—  
 6 Com. D.  
 461.—5 D. &  
 E. 92.—  
 2 Ves. jr. 241.

§ 11. *Where a use vests by deed, or by the power reserved.* A, seized in fee, made a feoffment to the use of such person or persons, and of such estate or estates as he should appoint by his last will, to the use of his last will; the use vested in A, and he was seized of a qualified fee till a declaration or limitation made according to the power reserved; by his will he limited the estate according to the power, and it took effect by force of the feoffment, and the use was directed by the will, and the will was but declaratory: but if A had by his will devised the land itself, as owner of it, without referring to his authority, the land had passed by the will, for the testator had an estate devisable and also a power to limit a use, and he had an election to pursue which he pleased. See Ch. 135, a. 5, s. 28.

6 Co. 18, 19,  
 Clere's case,  
 cited Cruise  
 on Uses, 190,  
 198.

§ 12. An estate is limited in trust to A for life, remainder to trustees during A's life to preserve the contingent remainders, remainder to his first and every other son in tail male, and remainder to B &c., remainder to the right heirs of the grantor, A is a papist, and has no son, the trust during his life shall go to the right heirs of the grantor, and not to B, the next in remainder.

Mosely's R.  
 11.

§ 13. The papist is excluded in England, because by the laws of that country if one do not, in six months after arriving to eighteen years of age, "abjure the errors of his religion, by taking the oaths to the government, and making the declaration

2 Bl. Com.  
 257, 293.  
 11 & 12 W.  
 III. c. 4.

CH. 114. against *transubstantiation*," he "shall be incapable of inheriting  
 Art. 10. or taking by descent, as well as purchase any real estate whatsoever;" and it goes to the next of kin being a protestant: and  
 "persons professing the popish religion," "are disabled to purchase any lands, rents, or hereditaments," or to take a use.

ART. 10. *Covenant to stand seized to uses, &c.*

3 Com. D.  
263, 267.

§ 1. A covenant to stand seized may be for good consideration, as blood, or love and affection; and it does not change the possession, but the covenantor remains seized and must be seized when he makes the covenant. 4 Cruise, 188.

See a. 5, legal operation; & operation in law, see a. 4, s. 9.  
—Cruise on Uses, 85.

§ 2. If A covenant for himself and his heirs with B and his heirs, that on such a consideration B shall have the land, though the land does not pass for want of livery of seizin, yet B has the use raised in him by reason of the consideration paid; and the possession is now executed to the use, by the statute of uses.

2 Cro. 180.—  
2 Co. 18 a.  
—Co. Lit. 112.—Cro. El. 401.—4 Cruise, 185, &c.

§ 3. So if A for a good consideration covenant with B, that he, A, will stand seized at a future time, a use is raised in B, and the statute executes the estate, and the possession is united to the use; and the same rule holds if A be seized only of a reversion or remainder: but this covenant must be by deed, and with one able to take, and so not with a wife; and the covenantor must be seized at the very time he makes his covenant. None can covenant to stand seized &c. but one who can be seized to a use. 4 Cruise, 187.

2 Wils. 75,  
Roe v. Tranmer.—1 Mod. 98, 159, 161.  
—2 Mod. 207 to 212.—3 Mod. 237—4 Cruise, 187.  
—2 Cruise, 354.

§ 4. But a person seized of the land may covenant to stand seized of it to the use of another, after the covenantor's death, but then the covenant must be that he himself will stand seized though the uses do not arise till after his death; for a covenant that his heir shall stand seized is not good; and the covenant too must be made by apt words. If one "covenant to stand seized to the use of the heirs of the body of J. D., thereby the covenantor has" a fee simple in the mean time. A "use is construed as favourably as may be, to comply with the intention of the party;" and hereon a rent may be reserved. 4 Cruise, 192.

1 Mod. 121,  
Pybus v. Mitford; cited 1 Cruise, 446, & on Uses, 199.

§ 5. "A man cannot convey to himself an estate by a conveyance at common law, but by way of a use he may." In this case Michael Mitford was seized in fee, having Ralph Mitford, issue by his second wife, and covenanted with Ralph Dalwell and others to stand immediately seized of the land, "to the use of the heirs males of the said Michael Mitford, begotten or to be begotten, on the body of Jane his wife, the reversion to his own right heirs." Michael died, leaving his son Robert his heir, by his first wife, and said Ralph by his second wife Jane. Robert entered, and his title came to the plt., Ralph had issue, Robert the deft. Judgment for the

deft., by three judges against Twisden. And held, Michael, the covenantor, took an estate for life by implication, and by consequence had an estate tail; and is as strong, though by implication of law, as if the covenantor had limited an estate in himself for life; "and a limitation to the heirs of his body is in effect a limitation to the use of himself; for his heirs are included in himself." The intention was, the oldest son should not take, but the issue of the second wife. And an estate may pass by way of future use, as in *Pybus v. Mitford* it was said, that "when a man limits a use to commence in *futuro*, and there is such a descendible quality left in him, that his heirs may take in the mean time, there it shall operate solely by way of future use. As if a man covenant to stand seized to the future use of J. S. after the expiration of forty years, or after the death of J. D., then no present alteration of the estate is made, but it is only a *future use*; because the father or the ancestor had such an estate left in him which might descend to his heir, namely, during the years, or during the life of J. D. But when no estate may, by reason of the limitation, descend to the heir, until the contingency happen, then the estate of the covenantor is moulded to an estate for life:" here the covenantor qualified his old fee simple, "and converted it into an estate tail, namely, part of the old estate. And "if a man covenant to stand seized to an use to commence after his death, the covenantor thereby becomes seized for life."—Can be only to the use of the covenantee.

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Art. 10.

1 Cruise, 461.

§ 6. Thomas Southcot had two sons, P. & W., and was seized in fee of a farm, did, on P's marriage, covenant to stand seized of it to the use of said P., and the heirs males of his body on M., his wife, to be begotten, and for want of such issue, to the heirs males of the covenantor; and for want of such issue, to his own right heirs forever. P. had issue, Edward, on his wife M., and five daughters, and died; the covenantor died, and Edward died without issue; the question was, if the five daughters, as heirs general of the covenantor, or W. their uncle, as special heir male of him the covenantor *per formam doni*, should inherit. Judgment for W. "for though at the common law a man cannot be donor and donee, without he part with the whole estate, yet is otherwise upon a covenant to stand seized to uses." It is plain, Thomas meant W. should take *per formam doni*, as Thomas limited it to his heirs males. So the estate tail once vested in Thomas, by the execution of the uses, came to him by descent, and not as a purchaser.

2 Mod. 207 to 212, Southcot v. Stowel.

§ 7. The words *give, grant, &c.* may be construed a covenant to stand seized. As in a settlement, one agreed, "that if I have no issue, and in case I die without issue of my body

3 Mod. 237, 238, Harrison v. Austin.

CH. 114. lawfully begotten, then I give, grant, and confirm, my lands  
*Art. 10.* &c. to my kinswoman Sarah Stokes, to have and to hold the  
 same to the use of myself for life, and after my decease to  
 the use of the said Sarah, and to the heirs of her body to be  
 begotten, with remainder over" &c. Adjudged this was a cov-  
 enant to stand seized, and raised a use to said Sarah, without  
 a transmutation of possession, and though there were no words  
 like the usual words in the covenant to stand seized.

Cruise on  
 Uses, 82.

Fox's case,  
 8 Co. 93.—4  
 Cru. D. tit.  
 32, ch. 11, s.  
 4 to 7, 15, 16,  
 17.—4Cruise,  
 174.—Cruise  
 on Uses, 66.

§ 8. And Fox's case was cited, who being seized in fee,  
 demised his land to C for life, remainder over for life, reserv-  
 ing a rent; and afterwards by indenture in consideration of  
 money did demise, grant, and let, the same lands to D for  
 ninety-nine years, reserving a rent; the lessee for life did not  
 attorn, in which case there was not a word of any use, or any  
 attornment to make it pass by grant. Held, this lease for  
 years amounted to a bargain and sale, so that the reservation,  
 together with the rent, should pass the estate to the lessee,  
 without attornment; and this by construction of law. A chat-  
 tel interest in land cannot pass by bargain and sale.

2 Wils. 75, &  
 a. 19, s. 5.

§ 9. A lease and release conveying a freehold *in futuro*,  
 and so void, were construed a covenant to stand seized to uses.

4 Mass. R.  
 135, Wallis,  
 exr. v. Wallis.

§ 10. So in this State it has been decided, that if A sell  
 lands with warranty, for a valuable consideration, to hold from  
 his death, no action will lie during his life to recover the con-  
 sideration money paid, though an action of covenant may lie  
 after his death, if a title be not made to the grantee or his  
 heirs. Nothing passed by the deed, "as it was intended to  
 convey a freehold *in futuro*." But if a father, for valuable  
 consideration, bargain and sell to his son, to hold after the fa-  
 ther's death, the law by reason of the consanguinity between  
 them, will presume a consideration of natural affection also;  
 and construe the deed as the father's covenant "to stand seiz-  
 ed of the land to his own use during his life, and after his de-  
 cease to the use of the grantee and his heirs." And it is  
 consistent with the money consideration to aver the natural af-  
 fection the father has for his son, as they stand well together.

2 Wils. 22,  
 Doe v. Simp-  
 son.—2 L.  
 Raym. 778.—  
 Loft, 216,  
 Doe v. Ogle,  
 & al.

§ 11. Where a deed cannot operate as a bargain and sale,  
 for want of a money consideration; nor as a release, for want  
 of a lease for a year; nor as a feoffment, for want of livery of  
 seizin; it may be good as a covenant to stand seized to uses:  
 but in construing a deed with reference to the consideration,  
 it is to be observed a voluntary conveyance merely cannot  
 avail against one in possession, nor against a valuable one. 4  
 Cruise, 186.

1 Johns. Ca.  
 91.—Willes,  
 673, Doe v.  
 Salkeld,

§ 12. A deed from a father to a son in consideration of  
 10s. may be construed to be a covenant to stand seized to the  
 use of the grantee. A deed granting lands to trustees to the

use of a wife, construed a covenant to stand seized ; many cases cited. CH. 114.  
Art. 11.

§ 13. This covenant to stand seized &c. does not divest any estate. 4 Cruise, 193 ; Gilb. Uses, 140. As if tenant for life, with contingent remainders depending on his estate, conveys his estate to B, by bargain and sale, or covenant to stand seized to his son's use in fee, B takes only an estate for life, and such remainders will not be destroyed. 2 Cruise, 362 ; Seymor's case, 10 Co. 95, same principle, if tenant in tail so covenant &c. ; 4 Cruise, 194 ; 5 Cruise, 430.

§ 14. The estate continues in the covenantor till a legal use arises. 1 Co. 154, see shifting uses &c. ; 4 Cruise, 192 ; 2 Roll. Abr. 783, and cases.

§ 15. Covenantor's capacity to be seized to uses when he covenants. A and B, joint-tenants in fee, A covenants that after B's death he will stand seized of B's moiety to certain uses ; though A survive, yet no use arises, because at the time of the covenant he could not grant or charge B's moiety. 4 Cruise, 188, Barton's case. The consideration must be marriage or affection to a near relation. Id.

§ 16. A by indenture between him and B, C, and D, his brother, and E, covenanted with them, to stand seized of certain estates to the use of himself for life, remainder to the use of his wife for life, remainder to the use of the covenantees and their heirs, on several trusts for his children. Held, the uses were well raised and vested in his brother D, he being of the blood of the covenantor, but that no use arose to the other covenantees, they being strangers. Same principle, 2 Lev. 52, 54, cited 4 Cruise, 192. So the covenantor's brother's marriage with A is a good consideration to raise a use to her. Plow. 300 ; so a son's wife, 4 Cruise, 189, Bould v. Winston. Ancient acquaintance, being chamber fellows, or entire friends, &c. is not a consideration to raise a use.

ART. 11. *Uses how destroyed.*

§ 1. Uses are destroyed by destroying the privity in estate, or confidence in the person ; as by feoffment on valuable consideration and without notice ; by a disseizin or entry by one who cannot be seized to a use. By merging the particular estate before the contingency happens, the contingent use in remainder is destroyed. If I covenant to be seized to the use of B, in consideration of his marriage with my daughter, and before the marriage B disseizes me, and makes a feoffment, and then I re-enter and then the marriage is had, the use is destroyed by the feoffment. So partition of the prior freehold destroys a contingent use.

§ 2. So uses may be destroyed by a revocation in pursu-

Smith v. Risle, 4 Cruise, 191.—Cro. Car. 529.—1 Co. 154, Paget's case.—Cruise on Uses, 92, Whaley v. Tancard.—Sharlington v. Strotton, Ch. 177, a. 9, s. 3.

See rule a. 16, a. 12.—1 Co. 121, 174, Digges' case.—6 Com. D. 443.—4 Cruise, 247.—2 Cruise, 374.—Cruise on Uses, 158, 170, 178.

Gil. Law of Uses, 133.

Co. Lit. 237.—6 Com. D. 154, &c.

CH. 114. ance of a power reserved. As if A covenant to stand seized  
 Art. 11. to the use of himself for life, then to his son in tail, with a re-

mainder over, *proviso* that it should be lawful for him, during his life, to revoke those uses, and limit new ones. So the power may extend to part of the uses : so to contingent uses as well as those in *esse*. So a power to revoke may be limited to a stranger. And this power to revoke may be by any words that shew the party's intention.

Co. Lit. 174. § 3. So uses may be revoked, a power being reserved to that purpose, by doing an act in the exercise of it inconsistent with those former uses remaining, and it is sufficient, the power be in substance pursued. So any act that destroys, in whole or in part, the legal estate out of which the use is to arise, so far destroys the use ; for a use, which is but the profits of an estate, cannot exist when there is no estate existing out of which this use or profit can grow, as it was appointed to arise.

§ 4. If lands be given to A and B for C's life, remainder to the right heirs of the survivor, if A release to B, the estate to the heirs is gone and destroyed ; for thereby the prior freehold is altered. But see Ch. 135, a. 5, s. 27, must be an alteration in quantity.

§ 5. In this case Sir Henry Wynston, in consideration of love and affection to his eldest son William, covenanted to stand seized to his use for life, and after to the use of such wife as he should marry for life, remainder to his first son in tail. William married the gaoler's daughter &c., and the covenantor, to prevent the use arising to her, leased for 1000 years to his youngest son, before this marriage. The court decided : 1. That this use to the wife was well created, and the covenantor's love and affection to his son was a good consideration to raise a use to any wife he might after marry : 2. That the lease did not destroy this use, though made while contingent, nor did it bind her estate ; as there was a good estate by the first limitation, and if not destroyed, could not be incumbered after raised, as it related to the first covenant, and none had interest to charge it ; "and the lease shall not destroy it, but may well be construed to arise out of the reversion," which the covenantor had, and might lawfully charge. William died without issue before his wife sued. See on this point, *Smith v. Belay*, Cro. El. 630 ; *Wood v. Reingnold*, Cro. El. 764 and 854. Taking all these cases together it appears such use to a future wife, though uncertain what woman when created, is good : 2. Such a use arises out of a freehold estate and seizin of it : 3. Is destroyed if that be destroyed or altered before the use arises and vests in such wife : but 4. Not if such freehold remain, and only a chattel interest, as a

Cro. Jam.  
 168, 169,  
*Bould & al. v.*  
*Sir Henry*  
*Wynston*.—2  
*Cruise*, 376.  
 Destroyed by  
 a devise of  
 the land, 2  
*Cruise*, 274 ;  
 not by a de-  
 vise of por-  
 tions out of  
 it, 276 ; nor  
 by a lease for  
 years ; nor  
 by a grant of  
 a rent charge,  
*id.* nor by a  
 fine, 5 *Cruise*,  
 219.

term for years, is created out of the freehold, because such a chattel interest or term for years cannot disturb the freehold &c.; or if the freehold be not altered in quantity. Ch. 135, a. 5. s. 27. CH. 114.  
Art. 12.

ART. 12. *Uses superstitious or charitable.* § 1. In the times of superstition, the multiplied conveyances to superstitious uses were such as required much of the attention of the English legislature for ages, to pass laws to check such conveyances, and others in *mortmain*. Where alienations of lands were made to any corporations, ecclesiastical or temporal, they were denominated in *mortmain*, because of their perpetual existence in the eye of the law, and of their being incapable of being attained; as in these cases the king lost his ultimate reversion, and the lords their reversionary interest and feudal services. As to these estates in *mortmain*, they were early viewed with a jealous eye. Hence, sixty or seventy years before the conquest, among the Saxons, the king's licenses in *mortmain*, to devise or grant to corporations, seem to have been necessary. But England was an old country, alternately catholic, and enacting laws in support of catholic superstition, or protestant and enacting laws against that superstition; and the circumstances and notions of that country were so very different from those of ours now, that English laws, on these subjects, cannot have much application to the United States. It may however be useful, briefly to notice our laws, relative to these. As to charitable uses we seem to have a standard; all such are agreed to be of this sort and proper, as are calculated to relieve the poor, and to promote such education and employment as the laws of the land recognise as useful. The laws of England, and of this country, allow donations to truly pious, but not to superstitious uses, as to which there can be no fixed standard. One nation or sect will deem that truly pious, which another will deem superstitious; whether the one or the other therefore, must depend on the religion and ideas of the country. Charities which became so excessive in the dark ages, especially to religious purposes, seem to have had their foundation in the time of the emperor Constantine, who by law allowed his subjects to bequeath their property to the church. Cod. Theodos. L. 16, t. 1, leg. 4. Soon the permission was so abused that the emperor Valentine enacted a *mortmain* law, by which these charities were restrained. Cod. Theodos. L. 16, t. 2, leg. 20. But this restraint was gradually relaxed as the clergy got power into their hands. And as to gifts in *mortmain*, it is a matter of real curiosity to observe the active warfare, there was for centuries, between the parliament of England and the religious houses;—the latter constantly contriving to get property into

See Ch. 22.—  
Ch. 104, a. 1,  
s. 10.—Ch. 90,  
a. 4.—Ch.  
125, a. 4, s.  
19.—Ch. 127,  
a. 10, s. 14.—  
Ch. 143. a. 5.  
—Ch. 125, a.  
9, s. 9.—2 Bl.  
Com. 268,  
269, sundry  
other cases  
as to charita-  
ble dona-  
tions.—See 2  
Ves. jr. 388.—  
11 Ves. jr.  
241.—3 Ves.  
jr. 141, Attor.  
Gen. v. Whit-  
church.—10  
Ves. jr. 534.—  
2 Br. C. R.  
428.—4 Ves.  
jr. 418, Cor-  
byn v.  
French.—4  
Ves. jr. 850.

CH. 114. their hands, and the former as constantly contriving to prevent  
 Art. 12. their obtaining it. As usual in the dark ages, the cunning of



9 H. III. 36,  
 &c.

the priesthood got the better of the civil magistrate. The evil became so great, that it was found necessary to provide, in the great charter, against these gifts, and to declare them void if made without license ; but the prohibition extended only to religious houses. It was no obstacle to bishops and other sole corporations, taking in *mortmain*, by long leases and other contrivances. Then the 7th of Ed. I. was passed, making it a forfeiture for any person, religious or other, to sell or buy, or receive in any form, in *mortmain*. This provision was soon evaded by the clergy, setting up fictitious titles to the land they meant to have, and by collusion with the superstitious owners ;—this gave rise to common recoveries. This artful contrivance gave rise to a statute directing the true title to be tried ; and if the corporation had it, then to have the land, otherwise not. As soon as these schemes were checked, the clergy invented uses, by means of which the superstitious owner conveyed his land to some person, to the use of, or in trust for some religious house or person. As this person, the feoffee, was the legal owner in the eye of the law, it could take no notice of the use or trust ; but the court of chancery, in which some ecclesiastical person generally set as chancellor, carried these trusts into full effect. This last contrivance was defeated by the statute of uses, 15 Richard II, and 27 H. VIII, aided by the reformation. Thus this interesting and intricate mode of conveyance to uses, as well as by common recoveries, grew out of ecclesiastical fraud. And to defeat grants to superstitious uses, the 23 H. VIII, c. 10, declared that all grants of lands for the purposes of obits, chantries, &c. should be void. But this act was considered to extend only to superstitious uses ; therefore one might give lands for the maintenance of a school, a hospital, or any other charitable uses. These statutes, as to *mortmain*, as also the 17 Ch. II, c. 3, are so interwoven with the king's license and tithes, that they cannot be in force in the United States ; though we may have adopted a principle, as common law, that it is not lawful, generally, to vest property in *mortmain* or dead hands, as tending to perpetuities, and an improper disposition. So as to the 43 El. c. 4, as to charitable uses, if ever adopted here, it must have been executed in a manner never practised in England, where it has been executed by commissioners, whose duty it has been to inquire &c. as to the lands &c. given by well disposed people : 1. For relief of aged, impotent, and poor people : 2. For maintaining sick and maimed soldiers and mariners : 3. Schools of learning, free schools, and scholars of universities : 4. For the repair of bridges &c. :

5. For education and preferment of orphans : 6. For maintaining houses of correction : 7. For marriages of poor maids : 8. For aid of young tradesmen, and persons decayed, and others : 9. For relief or redemption of prisoners or captives, and for aid of poor persons as to certain taxes, setting out of soldiers, &c. It has been well observed that this statute, 43 Eliz., has been long the standard of charity in England, and is between charity in its broadest sense, which means, "all good affections men ought to have towards each other," and the most limited-sense of the words, "the relief of the poor." 9 Ves. 399.

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Art. 12.

§ 2. It is obvious that some of these provisions never have been in use here ; and that none of them have ever been the subject of the inquiries of commissioners in Massachusetts, if in any other state of the union, or of forfeiture to the crown or government. On the whole, the English laws, on these subjects, can be of no further use here than as affording some sensible distinctions. As to superstitious uses, they describe them to be where property is given to maintain a priest to say mass ; to maintain him or others to pray for the soul of a dead man ; to maintain perpetual obits, lamps, torches, &c., used to help save the souls of men out of purgatory. So that superstitious uses in those laws seem solely to relate to certain catholic superstitions ; and property, given to those uses, is forfeited to the king ;—and the acts against conveyances in *mortmain* appear to have been passed principally on account of the losses those conveyances occasioned to the feudal lords, or to the king, reasons that never applied in America.

Porter's case,  
1 Co. 16 to  
26.—4 Co.  
104.—Cro.  
Jam. 51.—  
Salk. 162.—  
8 Co. 259,  
261, Thel-  
ford's case.—  
10 Co. 1, case  
of Sutton  
hospital.—  
6 Ves. jr. 567,  
Smart v.  
Spurrier.

§ 3. But in construing these laws, rules have been laid down, which are valuable in every state ; as that the erection of schools and the relief of the poor are always right, and the law will deny the application of private property only as to uses the nation deems superstitious. Hence, where towns, boroughs, or parishes in England have been unincorporated, lands have been ever legally conveyed to certain persons to apply the profits to their use, as to pay taxes, repair ways and churches, and maintain poor persons, &c. notwithstanding the statutes, forbidding conveyances in *mortmain*, and to superstitious uses.

1 Co. 24, in  
Porter's case.  
—Cro. Car.  
525.

§ 4. That acts allowing charitable gifts shall be liberally construed ;—hence a sick and maimed soldier shall receive the charity, though an alien ; so schools for writing, languages, music, &c. are within the description of schools of learning ; but not those for, dancing, fencing, &c. ; so a gift to a charitable use is good, though not strictly legal ; as if it be "to persons not capable by law to take," or to the poor of an hospital, though not incorporated ;—so to a corporation though misnamed. 1 Ch. Ca. 267.

6 Com. D.  
451 to 457.—  
2 Freem. 261.  
—Duke on  
Charities, 18,  
115, 139.

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4 D. & E. 264,  
Doe v. Phillips; money,  
bequeathed to  
found a Jewish syna-  
gogue, chan-  
cary has ap-  
plied to a  
founding  
hospital.—1  
Merivale, 55,  
100.—7 Ves.  
490.—Salk.  
162, case of  
Portington.

§ 5. W. Phillips devised to the Rev. Adam Aldridge, preaching at Lynnhurst meetinghouse, certain estate for his life only, on this express condition, that he, without delay, after the deviser's death convey to trustees, to take place at his death, for the support of preaching at that meetinghouse forever; and if that should cease, then to a certain school. Objected this devise, even to Aldridge for life, was void by 9 Geo. II, c. 36, as being to him in his character of preacher, and "a devise to a charitable use:"—but the court held, his life estate was clearly good, and only the subsequent limitation was void by that act. But a trust for a charity must be in writing; and therefore, if A devise lands to B, absolutely and without any trust, there can be no averment since the statute of frauds, that it was to a superstitious use; and in England, though a devise to a superstitious use is void, yet neither the king nor heir can have it, but the king shall apply it to a charitable use; and devises to charitable uses must, like others, be made as the statute of frauds requires, in writing, and with three witnesses &c.

Genner v.  
Harper, 3  
Bro. Car. Ca.  
166.—Law of  
Uses, 44.—  
Finch, 245,  
Attor. Gen. v.  
Green.—2  
Bro. Ch. Ca.  
492.

§ 6. The limitation of a use to the poor of the parish of A, is good, though no corporation; though incapable of property, at common law, in the thing, yet they are capable of a trust, and may shew the trust has been abused; and though no indefinite number of persons can claim property, in pleading, they may claim a trust, or to be *cestui que trusts*. Attor. Gen. v. Bowyer, 3 Ves. jr. 714. To the poor generally, is good, and how applied. 1 Vern. 224.

6 Com. D.  
454.—Dick-  
ens, 168.

§ 7. So if A give "the surplus of his estate for the good of poor people forever," without saying to whom, it is good.

Mosely's R.  
290.—Meri-  
vale, 55, 96.

§ 8. A gives the rest of his personal estate to his executors, in trust, to employ it to such charitable uses as A shall appoint by his codicil, but makes a codicil and appoint no use; this is void, for here he appoints no use. But Mills v. Farmer; Attorney General v. Jackson, 11 Ves. 365. The court of chancery in such case will be executor; so if the trustees die, living the testator. Attorney General v. Hickman, 2 Eq. Ca. Abr. 193.

7 D. & E. 759,  
note, White  
v. Hawkins,  
see a. 16.

§ 9. *Where the trustee can hold against the cestui que trust or not &c.* The general principle seems to be, that where a trust term is a mere matter of form, and the deeds, muniments of the estate of another, it shall never be set up against the real owner, nor shall a trust in ejectment be set up against him for whom the trust was intended. Again, if the *cestui que trust* in possession be in a condition properly to manage the estate, and the trustees are merely for form, the law courts will not suffer them to recover the estate out of his possession, and especially if no particular reason exist for putting the

trustees into possession ; but if the case be different in these respects, then the courts of law will allow the trustees to recover the estate from the *cestui que trust*. And see a. 17, s. 4.

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Art. 12.

In Pennsylvania it has been holden, that where there is no court of equity, the *cestui que trust* may have ejectment in his own name. And our court has inclined to the opinion that he may have *assumpsit* for the value of the rents and profits against the trustees.

1 Dall. 72,  
Kennedy v.  
Fary.—1 Bin.  
175.

An appointment to charitable uses bars an entail within the 43d of El. ; 1 Cruise, 57, Attorney General v. Burdett ; 6 Cruise, 18, 149, what conveyances to are valid ;—depend much on English statutes not adopted here.

4 Cruise, 23.

§ 10. *Who are cestui que trusts to a charity properly described.* Any indefinite multitude may be such. Hence “ a use limited to the poor of the parish of Dale is good, though no corporation ;” for though incapable “ of property at common law, in the thing trusted, because the rules of pleading require persons claiming, to bring them under the gift ; and no indefinite multitude, without public allowance, can take by a general name ; yet they are capable of a trust ; for here the complainants do not derive to themselves any right or title to the estate, but shew that it has been abused and misemployed by the owners, contrary to conscience.” In this case the devise was of a house &c., to so indefinite a multitude as “ poor men and poor women,” forever, and a free school. Held, a good charitable use, though poor men and poor women were not limited to time or place, by any words in the will, yet proper *cestui que trusts*. So a feoffment to the use of poor people :—and so of poor scholars. So a grant good to the use “ of poor, aged, maimed, needy, or impotent people ;” and of a free school for poor children and scholars, such as the grantor and others should think fit :—deemed proper *cestui que trusts*, the legal estate being in trustee, or a corporation appointed by the king’s charter ; both cases decided in actions at law between the charity interest and the heir at law. Held, also, charity interests good and supportable as to the *cestui que trust*, though the corporation to take the legal estate existed only in *potentia et nomine*, and not in *actu et re*. Like principles settled in the case of Downing College, 3 Ves. jr. 714, 730 ; and 5 Ves. jr. 300 ; see also 4 Ves. jr. 11, 15, Attorney General v. Minshull ; 3 Ves. jr. 630, 650, Attorney General v. Andrews ; 1 Ves. jr. 464 ; 2 Ves. jr. 389, Attorney General v. Boulthée ; 3 Com. D. 431 ; 3 Ves. jr. 141 ; 6 Com. D. Uses N 11, 12 ; Vern. 225.

1 Coke, 16,  
26, Porter’s  
case.—Stat-  
ute, 23 H.  
VIII., & 32  
H. VIII.

Bendlow’s  
case, cited 1  
Co. 16, & 10  
Co. 1, Sutton  
College case.

Downing  
College.—  
White v.  
White, 1 Bro.  
Ch. Ca. 12.

So a bequest towards settling a bishop in the British Colonies in America is valid, though before any one was appointed. 1 Bro. Ch. Ca. 144. So a devise to the church war-

Att. Gen. v.  
Bishop of  
Chester.

CH. 114. dens of a parish, though not incorporated, is good for a charitable purpose, though void at law. 2 Ch. Ca. 13, Rivitt's case; Moore, 890; 3 Ves. jr. 714; 1 Ch. Ca. 135, West v. Knight.

3 Bro. Ch. Ca. 160, Ogland's case. If a charity be so given that there are no objects, the court will order a new scheme: but if the objects may come into existence, the bequest is reserved for the old objects named; and when objects cease to exist, where there is in the donor an intention the charity shall continue, the court will new model it. (1 Ves. jr. 243, 246;) or change the mode of applying the charity; 3 Bro. Ch. Ca. 171.

3 Bro. Ch. Ca. 171.—Ambl. 236. Charities for foreign purposes are good, as missionary objects in India &c., as Bartlett & al., trustees, v. King, exr., Ch. 43, a. 11, s. 2; though formerly doubted in England if a court in one jurisdiction could execute a charity in another and foreign jurisdiction; that was the doubt in the case of the Virginia College, intrusted to educate Indians while a Colony, if the College could be controlled and the old mode continued after Virginia became independent. Charity in England carried into effect in Scotland by the English chancery, by transferring the annuities to persons in Scotland, to be distributed as the courts there directed. Also 14 Ves. 537; 16 Ves. 330.

When the revenues of a charity increase beyond the original objects, they are not a resulting trust for the heir at law, but are applied to similar charitable purposes, and to increase the benefit of the charity. In this, a charity differs from other cases, owing to the strong disposition that formerly existed to favour, support, and extend charities, somewhat in the spirit of the civil law, which preferred charitable legacies to all others; this spirit in part continues, though charity legacies now abate in proportion &c.

To aid charities, the courts supply all defects in conveyances, where the donor is able to convey and contravenes no statute. See Rivitt's case; Attorney General v. Burdett; same v. Bowyer; Collison's case &c., above, and this on the 43 El., which speaks of appointments to charities. It is enough the conveyances amount to a good appointment; if the donor or testator do not mean some devise &c. other than an appointment. Burn's Ecclesiastical Law, 226, and cases above; and Moore, 822, Damer's case. But Lord Chancellor Cowper thought the makers of the 43 El. never meant a distinction between operating by will and by appointment.

On the whole, looking back centuries, and it is very difficult to see on what rules or principles charities have been regulated, supported, or assisted.

Highmore on Mortmain, 67, 187, 327.—1 Vern. 230—Highmore on mortmain, 355.

Moore, 890.—1 W. Bl. 90.—Duke, 84, 85.—2 Atk. 37.

§ 11. Cases in which our legislature has aided *cestui que trust*, when indefinite, by appointing trustees, and making corporations to take and hold the legal estate. CH. 114.  
Art. 13.

§ 12. In 1638, Harvard made his donation to the school in Newtown, (now Cambridge,) an indefinite and perpetual succession of scholars &c., but did not appoint any trustees, so his charity must have failed had not the Colony legislature appointed trustees to receive and manage it; and in 1650 this legislature acted on the principles of *cy pres*, (that is executed the donor's intentions as near as could be done,) and transferred this donation from an *unincorporated school to Harvard College, made a body politic* in 1642. So in the case of the Hopkinton lands, A. D. 1741, in which chancery had appointed trustees; our legislature placed the charity estates in new hands;—lands given to support schools forever, among the inhabitants of a defined territory, not incorporated, continually varying; the legislature gave effect to the donation, by acts of incorporation. Acted on the same principles in the cases of the Ipswich school lands, A. D., 1756; Williamstown school act, March 8, 1785; Hopeland District act, March 7, 1791, March 1797; Charlestown school lands, act June 17, 1789; Dummer's academy &c.; Boylston's donations, act 1802, c. 44; Leicester academy act, March 27, 1784; Derby school act, November 11, 1784, &c. This has been the invariable practice of our legislature thus to appoint corporate trustees to take, hold, and manage the legal estate, since 1642. For this usage there have been good reasons. When our ancestors moved to America, they had learned in England the true distinction made by the 43 of El. between *charitable* and *superstitious* donations; their object has ever been to encourage the former, especially schools; they had no way to support such charity interests, but those above stated; for with them a court of chancery was ever unpopular, and so were the king's charters in charity cases. Still they found chancery powers indispensably necessary to be exercised to give effect to gifts and devises to charitable uses, and the above course was, on the whole, found the best.

Harvard's  
case, A. D.  
1642 & 1650.

ART. 13. *Trusts generally—what not a trust but legal estate.*

§ 1. A devised lands to trustees and their heirs, to the intent to permit B to receive and take the rents and profits for his life, and after his death the trustees to stand seized of the same to the use of the heirs of the body of B, with a proviso the trustees and B might make a jointure for his wife. Held, 1. This devise passed a legal, not a trust estate: 2. That B took an estate in tail. *Quare*, see s. 4.

Broughton v.  
Langley, 6  
Cruise, 325,  
1 Cruise,  
462.

CH. 114. § 2. Trust estates must be construed and regulated as legal estates are, whether real or personal, and though determined in chancery,—that is, according to the rules of law, “with this distinction, unless the intent of the testator or author of the trust plainly appears to the contrary,” Lord Hardwicke.

Art. 13.  
 Garth v. Baldwin, 2 Ves. 646.  
 Hopkins v. Hopkins, 1 Cruise, 461.  
 —Whetstone v. Bury, 2 P. W. 146.

§ 3. What a trust estate and not to use, see above, especially a. 3, s. 4. A grant or devise to trustees and their heirs, to the use of them and their heirs, on several trusts, vests the legal estate in the trustees, and the devisees have only trust estate. From this and other cases, says Cruise, it follows, that “if lands are conveyed by covenant to stand seized, bargain and sale, or appointment under a power, to A and his heirs, in trust for B, the legal estate will be vested in A, and B will only take a trust.” 7 D. & E. 342.

1 Cruise, 461, 462.

§ 4. Another way to create trusts is to limit to trustees to receive and pay over the rents to A;—only a trust, as A can receive nothing but through the trustee’s hands. 1 Eq. Ca. Abr. 383. Was affirmed in the House of Lords, and differed from Broughton v. Langley, said the court, as that was to permit B to receive the profits &c. But Holt C. J., and Fearne, deny Broughton v. Langley to be law; for trustees’ permitting &c. implies they must do an act, and retain the estate to do it, so only a trust. So always when the trustees must do certain acts to fulfil the trust, Ch. 135, a. 1. s. 16, as in this case. So if they must pay taxes, repairs, and expenses, deduct them and pay the balance over. Shapland v. Smith, 1 Bro. R. 75. So only a trust estate, where trustees must receive the profits, and apply them. 2 D. & E. 444, Silvester v. Wilson. So if for the benefit of a married woman. 1 Cruise, 465, Nevil v. Saunders. Same principle as to her, and paying over. Say & Sele v. Jones, 1 Eq. Ca. Abr. 383. But after her death the legal estate may vest in the heirs of her body. And 8 Vin. Abr. 262; 3 Bro. P. Ca. 113; see Horton v. Horton, a. 9, s. 7, to the same purpose. A trust, though the trustees were to permit a *feme covert* to take the profits, so the intention of the testator which governs. All trusts are executory. 1 Cruise, 489.

1 Cruise, 463, Chapman v. Blisset.—1 Cruise, 465.

1 D. & E. 193, Beable v. Dodd.

§ 5. *Trust to sell or raise monies to pay debts, &c.* The trustees take the legal estate, otherwise they could not execute the trust: and they must retain the estate according to the purpose intended to them and their heirs, though the word *heirs* be not used, if the trust require a fee. See Ch. 135, a. 1, s. 26; see Ch. 125, a. 7, s. 8, Kenrick v. Beauclerke, cited 1 Cruise, 469. It will not be a trust estate if it appears the *cestui que trust* is to pay the debts &c. A deed or devise to trustees and their heirs upon trust to pay debts, and after payment thereof, or when paid, then in trust for A. B., or to con-

3 Bos. & P. 175.

vey the unsold parts to him, in either case he has an immediate trust estate in the surplus, on the execution of the deed, or the testator's death. The payment of debts is not a condition precedent to the after limitation's taking effect. 1 Cruise, 470.

CH. 114.  
Art. 13.

§ 6. *The third mode of creating trusts is limiting terms for years in trust.* As if such term be granted to A to the use of and in trust for B, the legal estate of the term remains in A, and is not executed in B by the statute of uses: for A is not seized to the use of B, as the statute requires. Cases are uniform on this point. Resulting trusts, see a. 14, s. 3; and by implication, id.

Dyer, 369.

§ 7. *No trust, but a paternal advancement.* If a father buy lands in his minor son's name it will not be a trust, but such advancement, if no declaration of trust in the deed, on the ground it is the father's moral duty to provide for his minor children, and if he receive the profits during minority, it will be as his son's guardian in equity; and blood is a sufficient consideration to raise a use and vest it in the son. But if the father buy lands and take the deed to himself, and his son, and their heirs, as joint-tenants &c., and the father pays the purchase money, his moiety is liable for his debts, (cited 1 Cruise, 480;) he remained in possession,—decided in equity; but when the son is fully advanced and emancipated, he is as a stranger.

1 Ch. Ca. 296,  
cited 1 Cruise,  
477, 478,  
Grey v. Grey.  
2 Atk. 477,  
Stileman v.  
Ashdown.—1  
Ves. 76.

§ 8. "A trust estate is equivalent to the legal ownership, and is regulated in the same manner as the legal estate." Confidence in the person is still necessary, but not privity in estate. *Cestui que trust*, in possession, is deemed the real owner: and trusts are alienable, devisable, and descendible.

1 Ves. 357.—  
1 W. Bl. 166.  
1 Cruise, 492,  
493.

§ 9. Trusts are entailable as a legal estate, and can be barred but by fine and recovery, though formerly held otherwise; and may be limited for life. 2 Vern. 344; Ambl. 518; 1 P. W. 108; merge in the legal estate, 1 Cruise, 503; trusts are assets, Co. L. 374.

1 Eq. Ca. Abr.  
256.

§ 11. Trusts are in some measure included in uses, and have been, in some degree, already considered with them, but to several purposes are a distinct branch. By a narrow construction of the 27 H. VIII., trusts seem to have taken the place of uses, at common law; and as the act extends only to one seized, all chattel interests remain as they were by that law; and where one holding an estate to a use is only possessed, and not seized, the act does not apply nor annex the estate or possession to the use. But trusts and legal estates, though distinct, are governed by the same rules; and so descend in *gavelkind* &c., as the land does. A trust is a use in

2 Fearn, 288;  
law of Uses  
& Trusts, 19.

CH. 114. consideration of law :—results on a conveyance without consideration. 1 Cruise, 474.

Art. 14.

5 Bac. Abr.  
390.

2 Fearn, 288,  
Law of Uses.

2 Fearn,  
288, 289.

§ 12. If the trustee sell for a valuable consideration, and without notice, the buyer's title is good, and the trustee is accountable to the *cestui que trust*, in equity, or in an action; and if one buy of the trustee with notice, the buyer becomes trustee and accountable; and if the trustee or buyer fail, the *cestui que trust* may look to either. The legal estate and trust, though separate estates, are concurrent, and vest the same moment. If the trustee sell to A for a valuable consideration, and to his use expressly, though with notice, he holds free of the trust. A trust "is a use in consideration of law, and follows the person of *cestui que trust*, being the beneficial interest and profit." "Where the legal estate is vested in trust, it is a principle in equity, that so much of the trust as is not disposed of in the conveyance remains in the *alienor*, as his ancient trust; this is called a *resulting trust*," and if by will it devolved on his heirs at his death. As if a conveyance or devise be "to trustees and their heirs to pay debts, or to them to sell and pay debts, it passes the whole estate, in law, to the trustees, and part only of the trust, that is, the trust to the extent of the particular purpose; and the residue of the trust will go in the same manner as the purchase money, which is the trust of the real estate." So if the owner of the inheritance create a term "in trust for a particular purpose, so much of the trust as is undisposed of results to the owner of the inheritance, and constitutes a part of that inheritance." As if a term of years be devised to pay debts, "the profits of the land beyond the debts, and the term itself, after the debts paid, will belong to the heir," and of course be attendant upon the inheritance.

2 D. & E. 444,  
Silvester v.  
Wilson.

§ 13. *A trust estate for life, and a legal estate in remainder*, cannot unite. As a devise to trustees in trust to receive rents and profits during A's life, and to apply them to his maintenance for his life; the use is not executed in A, and cannot unite with a limitation subsequent to the heirs of the body of A.

#### ART. 14. *Several kinds of trusts.*

Law of Uses,  
67.—Co. Lit.  
173.

§ 1. A trust with an interest. As if one devise lands to his executors to be sold, or his lands to be sold by his executors, the estate is devised to them; and the interest survives with the trust. In this case if one refuse, the other, at common law, could sell only his moiety; otherwise by 21st H. VIII., c. 4, by that act he may sell the whole, though the other refuses or dies;—this act we adopted of necessity, for if one of two executors dies, there can be no sale but by the other, &c.

Law of Uses,  
66, 68.—Co.  
Lit. 112, 113.

§ 2. *Trust without interest.* As if one devise that his ex-

ecutors sell his lands, the lands are not transferred to them, but only the trust; and at common law trusts are to be taken as authorities without an interest, and do not survive. So if one devise that A and B sell his lands, and one dies, the other cannot sell; for as he authorized and put both in his place, one cannot represent him: and neither executor can purchase;—as he sells, it is contrary to the trust for him to be a buyer. But see 21st H. VIII., c. 4, above.

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Art. 14.

§ 3. If lands be limited in trust to pay debts and legacies generally, the lands are discharged as soon as the money is raised, though the trustees misapply it. A husband cannot recover trust money due to his wife. And generally an executory devise, after an estate devised to pay debts, is too remote.

Salk. 153.—  
Ferne, 288,  
289.—1  
Cruise, 543.

§ 4. Third. *Resulting trusts* are where one conveys to such trusts as he shall appoint, and he appoints none, a trust results to himself. Trusts resulting by implication of law are excepted out of the statute of frauds, and are on the footing they were at common law, at which a bare declaration by parol prevented any resulting trust. If A buy lands with B's money, and takes the deed to A himself, he holds it in trust for B, though the deed declare not the trust; for the statute extends not to trusts raised by operation of law, and the fact may be proved by parol evidence. So if one buy in another's name. See Parol Evidence, Ch. 93; 1 Cruise, 474.

5 Bac. Abr.  
394.—1 P. W.  
112.—See a.  
17, s. 8, 9, 10,  
11, 12, 13, &c.  
—1 Cruise,  
471, 477.—2  
Vent. 361.—  
1 Wils. 21.—  
5 Bac. 394.—  
1 Cruise, 471.  
—1 Ch. Ca.  
39.

§ 5. So if A make a voluntary conveyance of an estate, and declare the trust as to part, and is silent as to the rest, the trust as to the residue shall result to him. In these two cases only can a trust result by operation of law, the only cases allowed since the 29 Ch. II., unless there has been a plain and express fraud. 1 Cruise, 471; 2 Atk. 50, 148; 3 P. W. 22, note.

Ferne, 289,  
290.—5 Bac.  
Abr. 394, Bern-  
ard in Chan.  
Lloyd v.  
Spillit.

§ 6. Where there is a consideration, there can be no resulting trust, and where it is said in the deed, the purchase money is paid by the grantee named in it, then it seems there can be no averment that it was the money of another since the statute of frauds; for this would be to contradict the deed by parol evidence. See a. 17, s. 13; also parol evidence, Ch. 93; no dower in a trust, 1 Cruise, 415; 1 P. W. 321.

1 P. W. 323,  
Ambrose v.  
Ambrose.—  
Lade v. Lade,  
1 Wils. 21.—  
5 Bac. Abr.  
394.—1 Salk.  
153.

§ 7. A trustee purchased lands with the profits of a trust estate, and took the deed to himself. Held, here is no trust for *cestui que trust*; "for it is not a trust in writing; and a resulting trust it cannot be, because that would be to contradict the deed, by parol evidence, directly against the statute of frauds; but if it had been recited that this purchase had been made with the profits of the trust estate, this appearing in the writing might ground a resulting trust." On appeal to the House of Lords this decree was confirmed. See Pa-

Chan. Cases,  
84, Kirk v.  
Webb.—5  
Bac. Abr. 394.  
—1 Cruise,  
473.—  
Evidence a  
license ad-  
missible.

CH. 114. rol Evidence, Ch. 93. No trust results on a purchase in the wife's name, 1 Cruise, 484; nor between lessor and lessee, Art. 15. 485; results if there be a fraud, id.

Chan. Prec. 168, Halcot v. Marchant. § 8. "So where the testator empowered the executor to lay out the personal estate in land, and settle it on A and his heirs, and the executor being about to make a purchase, informed A's mother of it, asked her consent, but took the conveyance in his own name, and no trust in writing was declared, but it was proved that he, at several times, declared it must be sold to make A satisfaction; yet the court (though inclined to decree a conveyance to A, the executor being dead insolvent,) declared it could not, because there was no express proof of the application of the trust money." And see a. 13.

Ambl. 151.—  
2 Johns. Ch.  
R. 409.

Fearne, 301, 303, Webb v. Webb—2 Burr. 1107, &c. § 9. Generally executory devises, and the limitation of the trusts of terms, are governed by the same rules. And on a settlement of a term in trust for A for life, then to his wife for life, and after their deaths for the heirs of their bodies; she died leaving issue, A survived; the court held, the whole term vested in A. In some special cases the heir has taken as a purchaser. If a trustee buy in debts at a discount, he shall not be allowed the whole; *secus* if in his own right.

1 Salk. 155.

#### ART. 15. *Goods put in trust.*

Cowp. 432,  
Cadogan v.  
Kennett.—  
Fearne, 36.—  
4 Cruise, 393.

§ 1. How the property is in the trustees &c. In this case, Lord Montfort, in a marriage settlement, settled his real estate, and his household goods in the house, in a schedule annexed to the settlement, to trustees, for himself for life, remainder to his intended wife for life, remainder to the sons of the marriage in strict settlement; after the marriage he continued in possession of the goods, after which his creditors took them in execution on a judgment. The trustees brought an action of trover, and recovered. And Lord Mansfield observed, that it was part of the trust, that the goods should continue in the house, as they might suit no other house; that the creditors had no right to take the goods themselves, the possession of them belonged to the trustees, and the absolute property of them was then vested in the eldest son, and they were to be kept in the house for his benefit; but Lord Montfort might have let them with the house; and his creditors might be entitled to the rent of them; and though Lord Montfort was in debt when he made this settlement, the court thought it was not any evidence of fraud he remained in possession, "because it was in pursuance and execution of the trust:—it was no contrivance to defeat creditors, but was meant as a provision for the lady, if she survived, and heir-looms for the eldest son; that although such settlements were frequent, no case had been cited to shew they were fraudulent."

§ 2. So it has been decided, that if the trustees permit the *cestui que trust* to use the goods or furniture, and his creditors take them for his debts, the trustees may recover them in an action of trover. In law are but borrowed goods.

§ 3. So a tenant for life of chattels or goods, cannot harm them; they are held in trust for him in remainder. As where plate was bequeathed to trustees for the use of the testator's widow for her widowhood, she to sign an inventory of it; afterwards she pawned it to a pawnbroker for a valuable consideration, who had no notice of the settlement; after her death the remainder-man recovered it in trover against the pawnbroker, though he was not paid his debt:—for no man can transfer to another more than he has himself, or have taken from him for his debts more than he has; nor can he who has a life estate devised to him out of a term for years &c., destroy, by his forfeiture, or otherwise, the contingent interest by executory devise in remainder.

§ 4. The trust of a term is settled, to arise on a contingency: 1. If A and B die without leaving issue male: or 2. If such issue male die without issue. The first is good, and if that happen, the court will not inquire as to the other.

§ 5. Lands or property settled in trust to pay debts are discharged as soon as the money is raised, though misapplied by the trustee. A trustee cannot vary the mode of sale &c. *Lofft*, 492.

#### ART. 16. Powers of trustees.

§ 1. *How far can the trustee prevent the cestui que trust from recovering possession in ejectment.* Doe was lessee of Sir William Gibbons, he the heir of Sir John Gibbons v. Potts & al. Sir William claimed as heir at law to Sir John.

March 29 & 30, 1754, Sir John Gibbons bought Hammond's lands of the trustees of the Earl of Dunmore deceased, in fee by lease and release.

April 2, 1754, Sir John mortgaged them by indenture to said trustees for 1000 years to secure £10,000 and interest, part of his purchase money.

April 7 & 8, 1755, he mortgaged them in fee to Mrs. Agatha Childs, and mentioned the mortgage to said trustees, and that paid, and the term assigned April 8, 1755, to trustees, for better securing £20,000 not paid.

April 17 & 18, 1755, by lease and release, Sir John purchased other freehold lands in the same place: and April 19 and 20, by lease and release he mortgaged both in fee to Mrs. Child, for the securing further the £20,000.

August 30 & 31, 1771, by lease and release, Sir John, as a marriage settlement for the lessor of the plt. and wife, &c. reciting how he bought them and Mrs. Child's mortgage, con-

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Cowp. 435,  
in a note,  
Foley v. Bur-  
nell.—2  
Fearne, 39,  
40.  
Fearne, 55,  
Manning's  
case.—8 Co.  
96, 187.—2D.  
& E. 376,  
Hoare v. Par-  
ker.—10 Co.  
47, 48, Lam-  
pet's case.—1  
P. W. 651.—  
4 Ves. jr. 600.  
—1 Ves. jr.  
185.

2 W. Bl. 704,  
Longhead v.  
Phelps.

1 Salk. 153.

Dougl. 710,  
Doe v. Potts.  
—See art. 9.

See art. 17, s.  
4.

CH. 116. veyed to Buller and Pickering in fee, the same to the use of  
 Art. 16. Sir John for life, remainder to trustees to support &c., remainder to the plt's. lessor for life &c., remainder to Sir John in fee.

November 22, 1772, Sir John made his will, reciting this settlement of 1771, and devised the reversion in fee of these lands to Saunders (since dead) and said Pickering in fee, on certain trusts and to certain uses not material, and devised to them certain other lands in trust to sell to pay mortgages &c., and then to pay legacies. When Sir John made his will, Hammond's lands were in mortgage to Mrs. Childs, as above.

March 1 & 2, 1776, by lease and release in consideration of £20,000, (Mrs. Child's mortgage money) paid to the persons then entitled to the same by Buller and Pickering, said trustees in the marriage settlement, said Hammond's lands &c. were at the request of Sir John and plt's. lessor and wife, released and confirmed to said Buller & Pickering and their heirs to the same uses and trusts as by said marriage settlement were limited, discharged of all rights to redeem &c.

March 1 and 2, 1776, by lease and release between the same parties, reciting the £20,000 paid, and the premises discharged, all such lands in the lease &c. of April 19 and 20, 1755, were conveyed to the use of said Pickering, his heirs and assigns, free from the *proviso* of redemption contained in the release of April 20, 1755, in trust for said Sir John in fee. He died June 1776, not having altered his will, much in debt on bond; the surviving trustee under the will, thinking himself entitled to these lands, in the lease &c. of April 17 and 18, 1755, agreed to sell them to pay Sir John's debts.

Here at the time of the action the legal estate in said freehold lands was in Pickering, the trustee.

Lord Mansfield and the court held, the legal estate so in the trustee, and observed, it was said for the heir, it is now settled, "that the title of a mere trustee shall never be set up to keep the *cestui que trust* out of possession." The court answered, "that the trust estate shall never be set up in an ejectment to defeat the *cestui que trust* in a clear case;" where the trust is perfectly manifest, as in ejectment, the question is, who is entitled to the possession. "But if the trust is doubtful, a court of law will not decide upon it in ejectment;" but here Pickering is not trustee for the heir at law. Sir John, when he devised, "had merely the equitable fee in him," Mrs. Child was his trustee; then on paying off the mortgage money she conveyed the legal estate in fee to Pickering, which was merely transferring it from one trustee for Sir John to another; and I know of no determination or case in which a bare change of a trustee has been held to revoke a will." "Sir William cannot recover the freehold lands: for 1.

The trust is at least doubtful, which is sufficient : but 2. We think the will as to them is not revoked." In all cases where trustees ought to convey to the beneficial owner of the estate, a jury may presume a term surrendered to him. But if not so presumed, and it appear to the court on the face of the special verdict, that the term though satisfied is still outstanding in the trustee, such estate in him must prevail at law. 7 D. & E. 2, Doe v. Sybourn ; Do. 47, Goodtitle v. Jones.

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§ 2. In this case the court said, "it has been often decided, that an estate in trust merely for the benefit of the *cestui que trust*, shall not be set up against him ; any thing shall rather be presumed ; nor shall any man defend himself by any estate which makes a part" of the plt's. title :—this was ejectment. 5 East, 138 ; 2 Johns. R. 84, 221 ; 3 Do. 422 ; 1 Hen. & M. 228 ; 1 Bin. 133.

Cowp. 43,  
Doe v. Knott.  
—Bull. N. P.  
110.—2 D. &  
E. 698.—7 D.  
& E. 3, 47.—  
8 D. & E.  
2, 122.

§ 3. Several cases in which decided, that the estate of the trustee shall not be set up to prevent the *cestui que trusts* recovering the possession in ejectment, and especially if the trustee do not claim in the action, or it is between two *cestui que trusts*. Conveying in trust is a mere form of conveyance peculiar to England.

1 D. & E. 758,  
Doe v. Piggo.

In *Pennsylvania cestui que trust can support ejectment in his own name* ; as otherwise he would have no remedy in case of an obstinate trustee, there being no court of chancery in that State. *Kennedy v. Fury*, 1 Dallas, 72. There an equitable title is sufficient to support the action ; the judges of the courts of law having assumed chancery powers, and the people acquiesced. *Smith v. Patton*, 1 Serg. & Rawle, 80, 83. So in that State ejectment lies against the vendor, on articles of agreement, after a tender of the purchase money. 4 Bin. 77 ; *Minsker v. Morrison*, 2 Yeates, 344. So may the vendor recover from the vendee if in possession, in ejectment, if he do not pay the purchase money. 1 Yeates, 12. The case, as we see, is very different in Massachusetts, where there is no chancery court.—Seems now settled in England, that an equitable title cannot at law be set up against the legal title. 5 East, 132, *Doe v. Wroot & al.* and in notes, *Bart v. Rogers* ; *Doe v. Sybourn*, 7 D. & E. 2 ; *Goodtitle v. Jones*, 7 D. & E. 47 ; *Doe v. Wharton*, 8 D. & E. 2 ; *Roe v. Read*, 8 D. & E. 118 ; *Roe v. Lowe*, 1 H. Bl. 446 ; *Doe v. Staple*, 2 D. & E. 684. In ejectment the plt. must recover on a legal title. A satisfied term may be presumed to be surrendered, but not one unsatisfied, raised for a special purpose as to secure an annuity &c. A legal term prevails. 2 Har. & M'Hen. 236 ; 2 Serg. & Rawle, 527.

"The legal estate must prevail at law." Cases above, and *Jackson v. Sisson*, 2 Johns. Ca. 321 ; *Jackson v. Van Slyck*,

CH. 114. 8 Johns. R. 487, 488. See Ch. 178, a. 23, s. 16, and cases  
 Art. 16. there stated. This is now well settled, though not so formerly,  
 as above, s. 2, Doe v. Knott & al., 4 Am. Law Jour. 1.

Ch. 112, a. 2,  
 s. 9, &c. a. 5,  
 s. 9.

So if there be two equitable incumbrances, he who has the best right to call for the legal estate will prevail, though he has not actually obtained it, nor got an assignment or possession of the deed conveying it, and though his *lien* is the last. Williamson v. Gordon's exrs., 5 Munf. 257. So if there be two equal purchasers under a settlement, and one get a term, he can exclude the other while it continues.

*Rights derived in equity &c. from terms assigned, and such as attend the inheritance.* A legal term, while it continues, protects the possession of him who obtains it, though otherwise he has but a mere equitable estate. See several cases cited this article already, and Ch. 225, a. 8, s. 2; 4 Desaus. Ch. R. 491; Lofft, 230.

*A term attends the inheritance:* 1. When a term would merge in the inheritance if united, it shall attend it if in a different person, even by implication; as where A buys the inheritance in his own name and takes the assignment of a term in a trustee's name: 2. Or takes a conveyance of the fee in a trustee's name, and an assignment of a term in his own name. Sugden, 321, cites Green v. Lambert, 1 Vern. 2; Dowse v. Derivall, Id. 104; 2 Vern. 57; Tiffin v. Tiffin, 1 Vern. 1; Whitechurch v. Whitechurch, 2 P. W. 236, cited 9 Mod. 124, 128. Where a term of 1000 years attended the inheritance, mortgagee purchased the term in trust for himself, and then bought the inheritance in fee. Gilb. Eq. Rep. 168; 1 Stra. 619, 621, the same case; same principle, Goodright v. Sales, 2 Wils. 329, 332; North v. Langton, 2 Ch. Ca. 156; Maundrell v. Maundrell, 7 Ves. jr. 567; Milledge v. Samar, 4 Desaus. Ch. R. 617; 6 Bin. 138.

1 Vesey, 357.  
 —2 Ch. Ca.  
 78, cited 1  
 Cruise, 492,  
 493.

§ 4. *Trust considered as land in equity.* This being the case, the trustee in equity is a mere instrument to carry into effect the intentions of the grantor or deviser. Any disposition of a trust estate by the *cestui que trust* is binding on the trustee in equity: "But all those technical words which the common law requires in the limitation of particular estates, must be used in the disposition of trusts." A trust is forfeitable for treason, by statute; 1 Cruise, 500: but a trust estate of inheritance does not *escheat* on the death of the *cestui que trust*, without heirs, 502; but the trustee holds the land discharged of the trust; Id. As no man has power to be trustee to himself, when the trust estate vests in him who has the legal estate, the former merges. Dougl. 769, 779, Goodright v. Wells. The trustee has no power to prejudice the *cestui que trust* in equity, or to incumber his estate by his contract or conveyance, for if any

one takes an interest with notice of the trust, he is guilty of a fraud, though he pay a valuable consideration, (1 Cruise, 485, 541,) and the purchaser becomes trustee. Now a settled rule the trustee cannot incumber the estate with his debts or charges &c. Exceptions. If he be in actual possession and conveys to one for a valuable consideration, and he have no notice of the trust, such purchase is valid; for it is a rule in equity that an innocent purchaser shall not have his title impeached in any case; but the trustee will in equity be compelled to make full compensation to the *cestui que trust*. Same principle as to a mortgage. Trustees have equal powers.

§ 5. Trustees are compellable in equity (as in cases of old uses :) 1. To permit the *cestui que trust* to receive the profits of the land: 2. To execute such conveyances as the *cestui que trust* shall direct: and 3. To defend the title in a court of law or equity. But the *cestui que trust* is entitled to a conveyance only when he is entitled to the whole trust estate. Nor is the trustee compellable to convey when he is to retain the legal estate for any special purposes.

§ 6. *Purchasers, how far answerable for the purchase money being well applied on sales by trustees.* The general rule is, as above, if to pay debts generally, the purchasers are not answerable, but are, if to pay certain debts specified in the deed or will. This distinction is reasonable, for the purchaser cannot in one case know, and in the other he can, the debt to be paid. *Smith v. Guyon*, 1 Bro. R. 186. Legacies are on the same ground as specified debts; but when a trust is created for paying debts and legacies, a purchaser is not bound to see the monies applied to the payment of legacies; as the legacies cannot be paid without the debts, and, said the court, they are not specified. So in this case held, if one devise his real estate to his executors to be sold to pay debts, if his personal estate be deficient, a purchaser is not bound to inquire whether the personal estate be deficient or not; for if sufficient, he holds the lands against the heir, and he has his remedy against the executor: but if there be a *lis pendens* between the heir and executor to have an account, it is sufficient notice in law without actual notice of the suit, so that a purchaser takes at his peril. So as to chattel not liable, though to pay a particular debt, or it be specifically bequeathed. As where one devised a term for years to A, and died indebted, having made B his executor, B sold the term, on which A sued in equity, insisting that the term being devised to him the executor was but trustee for him, and that the purchaser must have notice of the trust, hence, take subject to it: held, the executor had power to sell the term, and the purchaser of it not held to see to the application of the money, and the devisee's rem-

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1 P. W. 278,  
Noell v. Je-  
van.

1 Cruise, 541,  
542.—1 P. W.  
82, 128, 278.

1 Cruise, 539.

2 P. W. 124.

1 Cruise, 542,  
Dunch v.  
Kent.—Lloyd  
v. Baldwin, 1  
Vesey, 173.—  
Ambl. 188.—  
1 Cruise, 544,  
Beyon v. Gol-  
lina.—2 Ch.  
Ca. 115, Cul-  
peper v. As-  
ten.—Abbot  
v. Gibbs, 1  
Eq. Ca. Abr.  
368.—Lining  
v. Peyton,  
2 Desaus. Ch.  
R. 375.—  
9 Mod. 418,  
Ewer v. Cor-  
bit.—1  
Cruise, 544,  
650.—2 Vern.  
444.—3 Bro.  
P. Ca., Sav-  
age v. Hum-  
ble.—1 Atk.  
463.—2 Dick-  
ins, 649.—  
4 Ves. jr. 97.  
—2 Vern. 6,  
Cottrell v.  
Hampson.—  
1 Cruise, 548.

CH. 114. edy is against the executor. So he may assign a term to pay his own debt to his creditor. *Nugent v. Gifford*, see *Winn v. Williams*, 5 Vesey jr. 130; *Lutwich v. Wixford*, 2 Bro. R. 248. And on the general principle above stated, the purchaser, with notice of the trust, must see the purchase money well applied, wherever estates are conveyed or devised to trustees upon trust to sell and apply the money for any particular or specified purposes mentioned in the deed or will; for if not answered, the estate is liable to them in the purchaser's hands. Hence a general practice to exempt him by special provision. See *Cruise v. Dickens or Pickins*, Ch. 225, a. 6, s. 3.

1 D. & E. 42,  
Bartlett v.  
Hodgson.—  
Boardman v.  
Rossman, 1  
Cruise, 564.—  
3 Do. 497.

§ 7. *Trustees, how accountable.* Generally, having equal powers they are equally accountable, yet generally, if two trustees join in a receipt for money, and one only in fact receives it, he only is accountable, and usually in trust deeds there is a clause to this effect. Whence each is accountable for what he actually received is a clause of indemnity, not of covenant; but if a trustee conceal a breach of trust by a co-trustee, he becomes liable to it equally. Trustees whenever guilty of a breach of trust, are liable and compellable in equity to reimburse the *cestui que trust* for any loss he sustains by their fault.

1 Bro. R. 130,  
Forbes v.  
Ross.—  
—1 Vesey, 9,  
Whelpdale v.  
Cookson.—  
4 Bro. R. 161.

§ 8. *Several matters as to trustees.* Usually cannot derive any benefit from the trust. Therefore, if he compounds a debt, or buys it at a discount, he has no advantage to himself, but is excused if he release or compound a debt for the benefit of the trust estate. If he purchases at auction or otherwise, any part of it, he is liable in equity to have his purchase set aside, (*1 Cruise*, 551, *Davison v. Gardner*.) though the transaction be fair and open, and he gives as high or higher price than any other. The restraint does not extend to the sales of estates of persons of full age, nor to open public sales of them before the master; nor can he bid by a third person fairly. As where on a devise to pay debts the trustee purchased a part, Lord Hardwicke said, he would not allow a trustee to buy, though "another person being the highest bidder, bought it for him at a public sale, for he knew the dangerous consequences; nor is it enough for the trustee to say you cannot prove any fraud, as it is in his own power to conceal it; but if the majority of the creditors agreed to allow it, he should not be afraid of making the precedent." He is not allowed any thing for his trouble, *1 Cruise*, 556; but has full costs, 557. If he refuse to accept a trust, he must release; *Id.* Trustees may be discharged in England, and others appointed in their places, *Id.*; not bound to enter into any covenants, except that they have done no act to incumber. *5 Vesey, jr.* 678, *Campbell v. Walker*. In no event can a trustee make a profit

3 Ves. jr. 740.  
4 Cruise, 92.

to himself by management or otherwise, in any purchase of the trust estate, if the *cestui que trust* in a reasonable time object. CH. 114.  
Art. 16.

§ 9 *Powers and interest of cestui que trust.* He is seized in consideration of equity;—Lord Mansfield's opinion, 1 W. Bl. 155, &c. *Burgess v. Wheate*. His estate is viewed as the land in equity as above; yet if he has an inheritance and dies without heirs, his estate does not escheat, 1 Cruise, 52; but may be barred by a recovery suffered by *cestui que trust* in tail; possession under the trustees bars all remainders and reversions thereon, though there be no legal tenant to the præcipe. But such recovery does not affect the legal estates. 1 Atk. 473; 5 Cruise, 460. As to devises of trusts see Devise. *Cestui que trust's estate* is within the statute of frauds, and the rules in Shelly's case, 6 Cruise, 72, 336; descending on the heir at law, is viewed as legal, not equitable assets, being made assets by statute, 1 Cruise, 503; will merge as above;—how a bar in ejectment, s. 1, 2, 3, this art.;—held in joint-tenancy, is subject to survivorship, 2 Cruise, 504. He must be reimbursed by the trustee and cannot be prejudiced by him, as stated above. He is but a simple contract creditor to his trustee, in regard to his breach of trust, even in equity, unless the trustee has acknowledged the debt to the trust estate under hand and seal. However it is said that Lord Hobart said, that the *cestui que trust* may have an action at law against a trustee for a breach of trust. No such action appears to have been brought in England or in this country; yet several judges have expressed an opinion like that of Lord Hobart. *Cestui que trust* cannot destroy contingent remainders, as the legal estate in the trustees will support them; see Remainders. He can make a good tenant to the præcipe to suffer an equitable recovery, and may suffer such recovery without his trustees joining, as in *North v. Champernoon*, above.

§ 10. *Uses and trusts; several special cases.* 1. The *scintilla juris*. In this case it was settled, that all contingent uses must arise out of the seizin of the covenantors, feoffees, or releasee, to uses, and not out of the seizin of any prior *cestui que use*. As if A enfeoff B in fee to the use of C and his heirs, with a proviso that if D pay C £100, that C and his heirs shall stand seized to the use of D and his heirs; this is void, for the future use ought to be raised out of the estate of the feoffee, and not out of the estate of the *cestui que use*. See *Lloyd v. Carew*, art. 31, 32, as to shifting uses &c; and also, 2 Cruise 357. To save a contingent use there must be an actual entry; a right of entry saves a contingent remainder.

§ 11. *Springing or shifting uses must take effect in a rea-* 3 P. W. 265.  
—3 Burr.  
8, s. 11, &c.  
1416.—W. Bl. 428.—Ambl. 479.—4 Cruise, 495, 496.—1 Com. R. 20, see a. a. 9.

1 Cruise, 992, 469.

2 Ch. Ca. 63, 78, North v. Champernoon.

2 Atk. 119.

2 Atk. 612, Sturt v. Melish.

1 Co. 117, &c. Chudleigh's case, cited 2 Cruise, 356; Cruise on Uses, 160, 161, 185. Cruise on Uses, 161, 162.

CH. 114. *sonable time or never.* This is a settled rule, and the time is during the existence of one or more lives in being, and nine months and twenty-one years after;—the same as in cases of executory devises, with a small allowance, as in *Lloyd v. Carew*, art. 31, 32; so long only can estates be rendered unalienable, whether created by executory devise, by uses, or trusts, for a springing or shifting use can no more be destroyed by fine, or recovery, or any other act of the first taker, than an executory devise can be; and these rules are applicable to declarations of trusts of terms for years. 4 Cruise, 505.

1 Co. 136.—  
2 Cruise, 374.

§ 12. *Springing and shifting uses &c. how destroyed.* The principle on which the cases turn is this, there must be a seizin to every contingent use, when it arises, or at least a possibility of entry, or a *sciatica juris* in the feoffees or releasees to uses, and if not no use can arise. Now it is clear that if such seizin or possibility of entry be divested, before the event happens on which the springing or shifting use is to arise, it will be destroyed. See cases, art. 8, 9, 11.

Cowp. 9, 12,  
Moore v. Ma-  
grath.—2 Eq.  
Ca. Abr. 753.  
Dyer, 111 b,  
n. 46.—1  
Cruise, 447,  
448.

§ 13. *Uses by implication.* In all conveyances to uses, working no change of possession, the use arising out of the estate of the covenantor to stand seized, and the bargainor, is called a use by implication; for in all such cases so much of the use as he does not dispose of remains in him as his old estate. It is in substance a resulting use that remains in the covenantor, yet in *Pybus v. Mitford*, a. 10, s. 5, such a use is said to be by implication; but where a use is expressly limited to the original owner of the estate, he cannot take any resulting or implied use, inconsistent with the use limited to him, *Salk.* 679, *Adams v. Savage*; as if he so limit a use for ninety-nine years he cannot have a use by implication.

ART. 17. *American cases &c. of trusts and resulting trusts.*

§. 1. Though the question has been made by some, there is no doubt but that the statute of uses was adopted in the English colonies generally, and especially in Massachusetts, and from the first settlement of the country. Conveyances founded on it, appear to have been made at very early periods, much after the English form: many deeds of the kind can be produced; the substance of one drawn by an able lawyer (R. Dana) was in the time of the Province in the form of a covenant to stand seized, in which A, by indenture with B, (trustee) for A's affection for T, his wife, and his love and affection for those after therein provided, for himself and his heirs did covenant, grant, and agree to and with the said B and his heirs, that he the said A, and his heirs should henceforth stand and continue seized of and in all that messuage situated in ——— bounded ——— with the appurtenances, to and for the uses, intents, and purposes

hereafter limited, to and for the use and behoof of the said A, for and during the term of his natural life, without impeachment of waste, and after his decease to and for the life of the said T (his wife) for and during the term of her natural life, without impeachment of waste, and after her decease, and the decease of the said A, to and for the use of such children or child of the said A and T, between them begotten, or to be begotten, as shall then be living and the heirs of such child or children &c. In this covenant A reserved power to revoke any of the uses except that to T, his wife, by deed, under his hand and seal, delivered in presence of two or more creditable witnesses, or by his last will in writing &c. and by such deed or will to limit any new uses.

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§ 2. In the year 1789, the demandant brought an action, and demanded an undivided seventh part of a farm in Rochester, bounded &c., and stated that Aug. 1, 1771, Sarah Gill, wife of Moses Gill, was seized in fee, and Aug. 3, 1771, died so seized, without issue, and the right descended to the demandant. Moses Gill was admitted to defend, and he and the two tenants pleaded that they, the two tenants, were not guilty; and issue. The defence was grounded on a deed, in which the said Moses Gill and his wife, in consideration of a marriage that had been had between them, for the settlement of all their lands &c., described in the deed and whereof they were then seized in her right in fee, and of 20s. paid them in hand by John Scott of U., "have given, granted, bargained, sold, and conveyed, and hereby do give, grant, bargain, sell, infeoff, and convey to him the said John Scott, all that messuage and farm in Princeton," described &c. lots in Rutland, and said farm in Rochester: "to have and to hold all and singular the aforesaid messuages, lands, tenements, hereditaments, and premises with the appurtenances and privileges to each and every of them belonging, to him the said John Scott and his heirs, to the use and behoof of them the said Moses Gill and Sarah his wife, and their heirs and assigns forever, and the heirs and assigns of the longest liver of them forever, and to no other use or purpose whatever:" in witness, &c. dated Dec. 4. 1770, acknowledged the next day, and recorded July 20, 1771. The jury found a special verdict, and thereon found her seized Dec. 4, 1770, and possessed, the said deed, and their full age; that she died Aug. 5, 1771, having never had issue; that the plt. is one of the next of kin and heirs at law of the said Sarah &c. Judgment that said Sarah did not die seized; and held, on the whole, that this conveyance to Scott, to the use of Gill and wife, &c. was good and valid; at any rate the court held that she parted with her estate by her deed to Scott. In *Marshall v. Fisk*, 6 Mass.

Mass. S. J.  
Court, 1793,  
Plymouth,  
*Thatcher v.*  
*Ormans & al.*

CH. 114. R. 24, the court took notice of this case, and said, that by Art. 17. "the statute of uses, a use cannot be limited on a use, so an estate cannot, by bargain and sale, be conveyed to one person to the use of another;" "but in this state a deed purporting to be a bargain and sale to A and his heirs, to the use of B and his heirs, has been holden in the case of *Thatcher v. Gill* to be a feoffment, by which A took the estate directly, and not by way of use, by virtue of the statute of uses." This doctrine of the court confirms the opinion held by the best lawyers, to wit, that our deed, often called a deed of bargain and sale, is not by any means a deed of bargain and sale in the English sense of the expression; and though not, properly speaking, a feoffment, yet it operates like a feoffment, immediately and directly on its execution and delivery, to pass the estate to the grantee, or bargainee, as sometimes called, without first raising a use in him.

7 Mass. R. 153, *Hastings v. Dickinson & ux.*—See Ch. 130, a. 6, s. 18. § 3. In this action the court held, that this part of the 27 H. VIII respecting jointures, has been adopted in this state, and had always been in force here; and a jointure to bar dower within this act must be for the life of the wife at least, and in lands, tenements, or hereditaments, and take effect in possession or profit immediately on the husband's death; a mere annuity does not satisfy the statute.

7 Mass. R. 189, 199, *Newhall v. Wheeler.*—See Ch. 135, a. 6, s. 26. § 4. This was a writ of entry *sur disseizin*, sued by Ezekiel Newhall to recover lands in fee, in *Pepperell*, in Middlesex county. Both parties claimed under Josiah Hunt, who seized in fee, conveyed to Joshua Symonds; he conveyed by deed, consideration expressed in it £50, to Samuel Cummings, Leo. Whiting, and John Goss, the selectmen of Hollis, in New Hampshire, "to them and their successors in the said trust of selectmen, for the time being, for the use, benefit, and behoof of the said Hunt, and after his decease, (if any of the premises should remain,) then to Hunt's heirs forever, to hold to the use aforesaid, at the discretion of the grantees, with warranty against all persons, claiming under Symonds, the grantor." Hunt remained in possession till he died, and devised the premises to his wife Elizabeth, in fee simple, who, on his death, entered, claiming under the devise, and continued in possession till taken in execution for her debt, and the judgment creditor conveyed to the demandant. The heirs of Symonds were admitted to defend, under the tenant, (tenant of Symonds.) The court decided, that said Cummings, Whiting, and Goss, took a legal estate in trust for J. Hunt and his heirs; that as the legal estate was in trust, it must be commensurate with the trust, and therefore was an estate in fee simple, and that Josiah Hunt had an equitable fee simple, which he might lawfully devise.

The demandant urged, 1. This conveyance of Symonds was to be construed a feoffment : 2. That Cummings &c. took a fee : 3. That the use to Hunt for life was executed in him by the statute of uses : and 4. As to the words, " then to his heirs forever," the word *heirs* is a word of limitation, and not *designatio personæ* ; and hence Hunt took by the deed a vested estate of inheritance.

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The tenant urged, that Cummings and others took but an estate for life, and cited Lit. s. 1, Co. Lit. 8, 9, &c., where said, a grant to one and his successors is only for his life ; then the feoffees being but for life, the *cestui que use*, Hunt, could not have an estate in the use, more extensive than the seizin out of which it was raised, and cited Saunders on Uses, 113 ; Dyer, 186 ; Bacon on Uses, 47 ; Cro. Car. 231 ; Cro. El. 721. So Hunt and his heirs took only an estate for the life of Cummings, Whiting, and Goss, and Hunt's heirs the remainder as purchasers directly from Symonds. The Court held as above, and added, that as we have no court " to compel a specific performance of a trust, it is a general rule to consider estates conveyed in trust as estates conveyed to use, if it be not repugnant to the manifest intention of the grantor ; if it be, it is considered as a trust estate, and the trustee is answerable for damages, as on an implied *assumpsit* to the *cestui que trust*, that he would execute the trust, a remedy certainly very inconvenient, and resorted to from necessity, because no court is competent to compel a specific performance of the trust." As the selectmen were to hold, at their discretion, it could not be to Hunt's use, as then the use would be immediately executed, " Hunt would hold the estate during his life, not subject to any control or discretion of the selectmen." Symonds, too, contemplated they might sell part or all ; hence could not mean that " the legal and equitable interest in the estate should unite in Hunt." Hence they, the trustees, took the legal estate in trust for Josiah Hunt and his heirs ; and as their estate was in trust, " it must be commensurate to the trust," and so in fee simple ; and by his will his widow had his equitable fee simple, " which the judgment creditor and and his assigns may lawfully claim against her. And no person can set up the legal estate against the equitable estate, but the trustees, or some person claiming under them ;" but neither the tenant or the heirs of Symonds claim under them. Hence " the equitable estate of Josiah Hunt, his devisee, and her assigns, they having the actual possession, is sufficient to maintain this action against the tenant or said heirs, " for the actual possession is *prima facie* evidence of a legal seizin ; and a stranger to the trust shall not be permitted to control this evidence by proving the existence of the trust estate." Judgment for the demandant.

CH. 114. In this case it will be observed that the court went on the ground the legal estate was in the trustees in fee, then of course the execution of the judgment creditor was levied only on the equitable estate of the *cestui que trust*, and this gave the creditor seizin and title against all persons but the trustees. Hence it follows that whenever lands are conveyed to trustees in trust for A, for instance, and he is in possession, he may devise them, or they may be levied on for his debts, or the debts of his devisee, in possession; and the judgment creditor becomes seized, and may convey, so that his grantee may sue on his own seizin, and recover, and hold the lands against every one but the trustees, and forever if they do not object. Our statute of executions authorizes the judgment creditor to levy on "the debtor's real estate," and whereof the officer may "deliver possession and seizin," and the execution makes "as good title to such creditor or creditors, his or their heirs and assigns, as the debtor had therein."

1 Mass. R.  
204.

1 Dall. R. 137,  
&c.—Willes,  
686.—1 Wils.  
354.

The same doctrine is held, that the courts in this State have no power to compel the execution of a trust. How a devise to trustees may be to them jointly in fee. Ch. 135, a. 5, s. 26.

§ 5. This was the case of a deed, covenanting to stand seized to uses, on the statute of uses of 27 H. VIII., c. 10, and the point decided was, that a deed to stand seized to uses, must, like all other deeds, have the word *heirs*. This was a case in Pennsylvania;—authorities cited were, 2 Wils. 22, 75, 521; 10 Mod. 35, 36; Atk. 8; 1 Mod. 175; 1 Bac. 252, 274; 1 Co. 87, 100; 5 Mod. 266; 6 Mod. 109, 110; Cro. Car. 450; 1 Ld. Raym. 187; Co. Lit. 9, 10; 2 Bl. Com. 108, 297, 336; 3 Bl. Com. 370; 3 Com. D. 214; 1 Com. D. 543; Gilbert's Cases, 75; 5 Bac. 357; Cro. El. 478; 1 Wils. 351, 352; 2 Wm. Bl.; all to prove the word *heirs* necessary in a covenant to stand seized or in a deed to uses. Proper consideration, a deed, and seizin in the covenantor.

Mrs. Russell's case; marriage settlement grounded on English law adopted here. As to English settlements on marriage, fraudulent, voluntary, or not, of but little use here, see Sugden, 461 to 480.

§ 6. This was a trust, and the execution was secured by a covenant from the trustees. When the widow of Thomas Russell Esq. married Sir Grenville Temple, an alien, her dower and property were mostly placed in the hands of three trustees for her separate use: and as there was no court of *chancery* in Massachusetts to enforce the trust, a covenant was taken from them to bind them to perform this trust; and if they failed to do it, to give an action against them on their covenant; this being viewed by the counsel employed, as a necessary substitute to the compulsive power of such a court. Before the marriage, Temple, with two of his friends, gave a bond, in the penal sum of \$100,000, conditioned to place the property in trust, as has been common in England. 3 Wood's

Con. 252 to 270 ; 5 Wood's Con. 169, 298, 320, 359, 365, CH. 114.  
513. Same counsel as in the probate cause, Ch. 76, a. 2. Art. 17.

§ 7. So her dower in Russell's estate was also assigned to trustees to receive and pay over the profits to her, and to her sole use and disposal, and her receipt from year to year to be a good discharge to the trustees ; in order that the use might not be executed by the statute of uses, as is the case where the land must remain in the trustee to enable him to perform the trust ; and that nothing might be in the power and disposal of her husband ; as he was an alien, he might be liable to have taken from him, on an inquest of office, any freehold estate, or interest, he had in his power or disposal in real estate. These settlements were on the further authorities, 2 Bl. Com. 336, 337 ; 2 Vern. 659 ; Co. Lit. 2 ; 1 Bl Com. 249, 293, 433 ; 1 Bac. Abr. 76, 80 to 83, 290, 302, 303 ; Co. Lit. 31, 129, 351 ; Cro. Car. 8.

Whenever a trustee selling as such, he never can be a purchaser, on a principle of legal policy. 3 Ves. jun. 740 ; 5 Ves. jun. 678 ; 1 Cain. Er. 19, 20 ; see *Bergen v. Bennet* ; 2 Cain. Er. 181, 183 ; 5 Ves. jun. 707 ; 2 Bin. 294.

§ 8. A purchase was made by a person at a sheriff's sale as agent of the plt., and the land was conveyed to the agent, the deed was held to create a *resulting trust* for the plt. which might be proved by parol. And if a trust be executed for the benefit of a person, without his knowledge at the time, he may affirm the trust and enforce its execution.

1 Johns. R. 46.—1 Johns. Ca. 163, *Jackson v. Stembergh* ; & 206, *Nielson v. Blight*.

§ 9. Trustees, and persons acting in *auter droit*, who execute conveyances of lands held in trust, are not responsible, in case the purchaser is evicted, unless there is fraud or an express warranty. So are the English authorities upon this point stated in several books. So where A buys lands with B's money, there is a resulting trust to B. See *Foot v. Colvin*, 3 Johns. R. 216 ; *Vent. 361* ; see Ch. 93 ; Ch. 136, a. 19, s. 1.

2 Johns. Ca. 278, *Murry v. Trustees of Kingwood Company*.—1 Johns. R. 45.

§ 10. Two trustees for the sale of land joined in the conveyance, and both acknowledged the receipt of the consideration money, but one, in fact, received the whole. Held, the other was not answerable for the monies so received and misapplied. *Secus* as to executors where they need not join in a sale of goods &c. 7 Bac. Am. ed. 183.

4 Johns. R. 23, *Kep's admrs. v. Deniston*.—4 Ves. jr. 596.

§ 11. In New York a deed from a father to his son for a pecuniary consideration, has been holden to be a covenant to stand seized. Was so in England before the statute of enrolments, 27 H. VIII, ch. 16, not adopted in New York.

1 Johns. Ca. 91, *Jackson v. Dunsbagh*.

§ 12. If there be a fraud in gaining a conveyance from another, it may be a reason for making the grantee in the con-

2 Bin. 387.—1 Vern. 276, *Palmer v. Young*.—2 P. W. 414, *Deg r. Deg*.—2 Vern. 571.

**CH. 114.** veyance to be viewed as a trustee. So where there were three lessees under a church lease, and one surrendered the old lease and took a new one in his own name, held to be a resulting trust for all three. And so if a guardian renew a lease in his own name, or a trustee for a minor, the renewed lease will be to his use. So if a trustee buy land with trust money, and take the deed in his own name, but admits the fact, a trust results. Other resulting trusts, 2 Vern. 645; 3 P. W. 20; 1 Bro. Ch. R. 501; 11 Ves. jr. 87; 2 Bro. Ch. R. 589; 3 Do. 355; 3 Cox P. W. 22; 1 Ves. 108; 1 Atk. 447; see *Wallace v. Duffield*, 2 Serg. & Rawle, 526.

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 Pr. Ch. 88,  
 103, 133, 163,  
*Heron v. He-*  
*ron.*—1 Vern.  
 366.—2 Vern.  
 480.—1 Br.  
 C. C. 582.—4  
 Ves. jr. 108.  
 —2 P. W. 414.  
 —1 Atk. 59,  
*Ryall v. Ryall.*  
 —2 Atk. 74,  
 257.—2 Vern.  
 645.—1 P.  
 W. 390.

§ 13. It is laid down as good law that there can be a resulting trust but in two cases: 1. Where A buys land with B's money and takes the deed in A's name: 2. Where the use is declared but of a part of the thing. As to the first, the better opinion is, if the consideration in the deed be expressed to be paid by A, and nothing appears to create a presumption, the purchase money was another's, parol evidence is not admissible, after A's death, to prove a resulting trust to B, as that would be against the statute of frauds and perjuries; but if A, in his life time, gives a declaration, or confesses a trust, that takes the case out of the statute. See *Ambrose v. Ambrose*. And so if it appears on the face of the conveyance, the purchase money was B's, that creates a trust in his favour. *Young v. Peachy*, 1 Cruise, 473, 474; *Botsford v. Burr*, 2 Johns. Ch. R. 409.

But Sugden, 445, thinks parol proof is admissible after A's death, in the case just stated, to prove a trust resulting. See *Newton v. Preston*, Pre. Ch. 133; *Gascoigne v. Thwing*, 1 Vern. 366: may be as well as admitted he holds after A's death, as in his life time; relies on *Lench v. Lench*, 10 Ves. jun. 511; on Peachey's case, Sugden, 446, and other cases he cites. But if he states the purchase money to be the grantee's in it, *quære* if parol evidence is admissible at all to prove he holds a resulting trust; see the point more considered, s. 21, 22, this article.

A trust results when it is clear the purchaser of land has purchased it with trust money. This was even the old strict rule. See *Bennett v. Mayhew*, 1 Bro. C. C. 232; 2 Do. 287; see Ch. 19, a. 1, s. 9; Pre. Ch. 84, 163, 168; *Kender v. Milward*, 2 Vern. 440; *Cox v. Bateman*, 2 Ves. 19; 2 Serg. & Rawle, 529; *Lane v. Dighton*, Ambl. 409; see a. 14, cases. But parol evidence alone is not often depended on. 10 Ves. jun. 510; *Wilson v. Foreman*, 2 Dick. 593; and 10 Ves. jun. 519. But there is no trust if the trustee view himself entitled to the trust money for his own benefit.

See above, and *Perry v. Philips*, 4 Ves. jun. 108, 117; 17 Ves. jun. 48, 173, 329; *Denton v. Davis*, 18 Ves. jun. 499. CH. 114.  
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If A receive monies in trust to buy lands for B, and A buys lands, though he take the deed to himself he is presumed to purchase in trust as intended, unless his intention appear otherwise, as if it appear he meant an after or different purchase; but in order to presume his purchase one so in trust, the estate purchased must be such a one as was intended by the owner of the money to be purchased. *Sugden*, 456, 469, who cites, among other cases, *Garthshore v. Chalie*, 10 Ves. jr. 9, (see Ch. 104, a. 2, s. 23, &c., and cases there cited;) *Whorwood v. Whorwood*, 1 Ves. 540; 4 Ves. jr. 116; *Pennil v. Hallet*, Ambl. 106; *Wilks v. Wilks*, 5 Vin. Abr. 293; see *Keech v. Hall*, Dougl. 22.

§ 14. *Resulting trusts*. If A buy land with his own money and take the deed in B's name by agreement, a trust results by operation of law to A, and may be proved A's money by parol, it not being within the statute of frauds. And it is said this being against the face of the deed, a resulting trust may be proved by parol. 2 Johns. Ch. R. 601. But no parol proof inconsistent with the deed can be admitted but by way of fraud, 409, 415; or of mistake, or of surprise, 585, and this is the true rule. 1 Vern. 366, 415; 4 East, 577. And if B purchase, having notice of the trust, he becomes trustee, though he pays a consideration, 566, for reasons before mentioned. 17 Ves. jr. 251; 1 Dall. 424. 10 Ves. jr.  
511, *Linch v. Linch* —  
1 Johns. Ch. R. 482, *Boyd v. M'Lean*.  
—*Roberts on Frauds*, 99,  
*Cox v. Grant*.  
—1 *Yeates*, 166.—1 *Dall.* 193.

§ 15. If no trust appear on the face of the deed, nor is there any evidence in writing of a trust, parol evidence is inadmissible to show a trust; must not this mean evidence inconsistent with the deed? Or where no resulting trust is pretended? 3 Ves. jr. 705, *Smith v. Wilkinson*. 1 Johns. Ch. R. 339, *Mc-van v. Hays*.

§ 16. *Executors and other trustees how accountable for interest*. They are chargeable for it if they have made use of the money themselves, or have been negligent either in not paying over the money, or in not loaning it, or in not investing it so as to render it productive. So if he convert to his own use the trust money, or employ it in his own business, he is chargeable with compound interest, (620) and annual rests are made. So an administrator, after a reasonable time allowed to settle his account, is charged with compound interest, and annual rests are made, 620. And every advantage gained by a trustee belongs to the *cestui que trust*; 1 Johns. Ch. R. 104; and chancery does not notice an administration or guardianship appointed in another State, 153. See Ch. 114, a. 19, s. 9, 10, &c.; see *Interest*, Ch. 41. 1 Johns. Ch. R. 508, 620, *Dunscomb v. Dunscomb's exrs.*—See art. 19, s. 10.

§ 17. *Held*, a trustee is not answerable for more than he has received of the trust estate, unless there is evidence of 2 Johns. Ch. R. &c.—1 *Cruise*, 551.

CH. 114. gross negligence, amounting to wilful default, *Osgood & al. v. Franklin & al.*; nor can they derive any benefit from the trust. 1 Cruise, 551. See a. 16, s. 7.

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Kirby, 368,
Bacon v. Taylor.

§ 18. Held, a conveyance to A, his heirs and assigns, &c. to hold in trust for B, his heirs and assigns forever, vests the whole estate in fee in B.

2 Caines' Ca.
in E. 183.

§ 19. And it is a general rule that a trustee cannot purchase. Sel. Ch. Ca. 13; 3 Desaus. Ch. R. 36, Munro & al. v. Allaire.

10 Johns. R.
496, 507,
Fisher & al.
v. Fields, in
chancery.

§ 20. *What writing creates a trust.* A soldier in the New York line of the United States army in the revolutionary war, received a regular discharge, and was entitled to bounty lands under the acts of New York. In March 1784, this soldier, Benjamin Griffin, sold his right to John Birch, and delivered the discharge to him, and on which he wrote under his hand and seal thus: "This is to certify, that the bearer hereof, John Birch, is entitled to all the lands that I, Benjamin Griffin, am entitled to, either from the State or Continent, for my services as a soldier, certified in my discharge." It was proved Birch paid Griffin at the time \$15, in consideration of the transfer, the then usual price. Held, this writing made Griffin trustee to Birch, and he in equity entitled to the land in fee, though objected it contained no words of contract or conveyance, no words of inheritance, and no consideration, citing *Wain v. Walters*, 5 East, 10; 6 East, 307; 1 Bos. & P. 252; 3 Johns. R. 399, *Bailey v. Bogert*. So was the opinion of the chancellor; but his decree was reversed in the Court &c. of Errors, in which held: 1. In 1784, Griffin had only an equitable claim before any patent issued: 2. That said certificate on his discharge transferred his whole interest to Birch: 3. That it amounted to a declaration of trust, and sufficient authority to Birch to get a patent in his own name, had not the statute directed it to be in Griffin's name, so that after the patent, Griffin took it as trustee to Birch: 5. "No particular form of words is necessary to create a trust; the intent only being regarded by courts of equity:" 6. "A trustee or *cestui que trust* will take a fee without the word *heirs*, when a less estate will not satisfy the object of the trust:" 7. "A trust is now what a use was before the statute of uses:" 8. "It is an interest resting in equity and conscience, and the same rules apply to trusts in chancery, as were formerly applied to uses." The respondents held under an after deed given by Griffin, with notice, and were ordered to convey to those holding under Birch, and enjoined not to proceed at law.

§ 21. If A take a deed of land, and in it the purchase money is said to be his, and no evidence in the deed it is B's; held formerly, as above, that no parol evidence can be ad-

mitted after A's death to prove a resulting trust, and so is Roberts on Frauds, pp. 99 : but some cases are otherwise, as stated by Sugden, 445, 446, who cites Pre. Ch. VIII. 133; 1 Vern. 366, Hooper v. Eyles; 2 Vern. 480, Crop v. Norton; 2 Atk. 74; 1 Johns. Ch. R. 486; 10 Ves. jr. 511, mostly cited above; 1 Serg. & Rawle, 83; 2 Do. 527. If such evidence be admissible, all agree it is to be admitted with great caution; Willis v. Willis, 2 Atk. 71; 1 Atk. 59; Ambl. 413. An equitable presumption may be rebutted by parol evidence. Langfield v. Hodges, Loft, 230; 2 Johns. Ch. R. 416; this is a general principle.

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Rider v. Kid-
der, 10 Ves.
jr. 360.

§ 22. After all the various opinions on the point, if A take a deed of land to himself, and it is expressly stated in it that the purchase money is his, and there is no evidence in it that it is another's, B's for instance, and there is no evidence of fraud or mistake, there can be no resulting trust; for to admit parol evidence to prove the purchase money is B's, is to admit it to prove it is not A's, directly against the deed, which says it is his. The opinions seemingly otherwise, must have rested on some fraud or mistake, or on some loose notions as to evidence. There are many other cases as to resulting trusts, some of which are, Lady Bellasis v. Compton, 2 Vern. 294; Taylor v. Alston, Sugden, 447; Goodright v. Clangfield, 2 East, 534; Lake v. Lake, Id.; Pearson v. Pym, 2 Eq. Ca. Abr. 743; Kinder v. Willer, 2 Eq. Ca. Abr. 744; Pre. Ch. 171; Pelly v. Madain, 21 Vin. Abr. 498, pl. 15; Lampugh v. Lampugh, 2 Eq. Ca. Abr. 744; O'Hara v. O'Neil, 2 Eq. Ca. Abr. 745; Dyer v. Dyer, Sugden, 447; Rastol v. Hutchinson, 1 Dick. 44, 484; Wray v. Steel, 2 Ves. & Bemes, 388; Finch, 341; 3 Cro. 550; 11 Johns. R. 96; Elliot v. Elliot, 2 Ch. Ca. 231.

Swift v. Da-
vis, 8 East,
364.—Hough-
ton's case, 17
Ves. 251.—
Redington v.
Redington, 3
Ridg. P. C.
106.

ART. 18. *When all executory interests must cease.*

§ 1. It is a settled rule, that all shifting uses, springing trusts, and executory interests whatever, including executory devises, must or may cease to become contingent, and become vested within a life or lives in being at their creating, with a mother's pregnancy and the child's minority added; this rule applies not only to inheritances in lands, uses and trusts, but to personal estate and chattels real. The reasons of it are: the law has long allowed the owner of property to suspend the powers of alienating it for a life or lives in being; and the want of such a power in the owner, while in *ventre sa mere* and in his minority, has ever been of course. After much consideration the judges put these portions of time together in order to form the period beyond which no interest may remain

2 Fearn, 77,
Taylor v. Bid-
dal.—1 Burr.
233.—
2 Fearn, 78,
Stephens v.
Stephens,
409, Standly
v. Leigh.—
2 Fearn, 79,
Madox v.
Staines; 80,
Heath v.
Heath; 81,
Sabbarton v.
Sabbarton.—
4 D. & E. 440,
Beachcraft v.
Tilbury v.

Broome.—2 Fearn, 92, 93, 112 to 114, Heneage v. Heneage.—3 Atk. 617, Barbut.—4 Mod. 316.—3 Salk. 299.—2 Lev. 36.—6 Cruise, 510 to 516.

CH. 114. contingent and unalienable. But the rule does not apply to any contingent or executory uses, or interests that may be destroyed by a common recovery, or otherwise, or by a tenant in tail, or by others. Therefore, a contingent remainder, depending on a preceding freehold, or on an estate tail in possession, or on either vested in interest, and there being a present legal right of entry thereinto, created by one and the same conveyance, may cease to be contingent, and vest at any future time; because where a power always exists in the owner of such preceding estate to destroy this contingent interest, by putting an end to such preceding estate, the danger of a perpetuity is avoided, the evil to be guarded against in all these cases; for by forfeiting or causing the preceding estate, whereon such contingent remainder rests, and whereto it must join, to cease, this remainder falls to the ground and ceases. And in these cases the law guards only against perpetuities. Where the power exists, exercised or not, there is no cause to fear them, as such contingent interests may thereby be destroyed, and so prevented coming into being at a period too distant. This power to destroy contingent remainders makes one material difference between them and executory devises; for as these remainders may be barred by other persons than those who claim them, it is not necessary to limit their vesting within the period named. But as executory devises cannot be so barred, it has been found wise to limit their vesting within that period. And as these devises and springing uses and trusts have been admitted of necessity, they are never allowed when the contingent interest can be supported as a contingent remainder.

2 Fearn, 218, 224.—
Doug. 487.

Doe v. Fonnereau,
Doug. 486,
502.

§ 2. But this kind of interest sometimes rests on a double contingency. One part may be in time and the other not:—and the grant or devise may be “to the issue, if there should be any, and if none, to the devisee over:”—and the executory interest may be an executory devise or a contingent remainder, according to events:—if issue, a remainder on an estate tail in the issue, if none, an executory devise, there being no preceding freehold ever vested; so one or the other as a prior freehold or not is created.

§ 3. But a remainder once vested as such, cannot be turned into an executory devise; that is, where the contingent interest is once well supported, and actually becomes a contingent remainder, resting on a preceding vested freehold, it never after can cease to be such, and become an executory devise. But before such interest actually becomes such a remainder, it may be one or the other, according to events. As where I devise lands to the unborn son of A, for life, and remainder to the unborn son of B in fee simple, and die be-

fore such son is born. Now as the freehold estate in the lands cannot be in *abeyance*, but must be vested, so that there always be a real tenant of this estate to answer the *præcipes*, or actions that lie only against the freeholder, and to do the duties the law requires of him; and as there is no devisee to take, the lands descend to my heirs in the mean time. And until A have a son born, and his freehold vests, the remainder to B's unborn son is not strictly a remainder, for as yet there is no prior estate in being, created with it to support it, or to make it remainder. But the moment A has a son born and his freehold estate vests for his life, it becomes an estate capable of supporting a contingent remainder, and the devise to B's unborn son becomes such, and as such contingent remainder must vest on B's having a son born, or fail for want of one; or cease forever on A's son's estate terminating by forfeiture, seoffment, or his death, or otherwise, before B have a son born. And if A have no son, and so no prior freehold arises under the will, and B has a son, he must take by executory devise, which needs no preceding estate to support it. In this case all the devises are at first contingent or executory, as no one can vest till some event named happens after the testator's death: and if I had also first devised or bequeathed a term for years, or any other estate less than for life to J. S. and this vested instantly in him on my death, it had been the same; as any interest less than a freehold, vested or not, has no effect whatever to support or make a remainder; as a legal remainder never can be but where the conveyance or devise creating it, puts the freehold seizin in some one, having a life or larger estate by this same devise or conveyance, either in actual seizin, or so seized in law, and an interest so vested in him that he has a present legal right of entry; and a right of entry on the prior freehold makes a remainder.

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ART. 19.

§ 4. The freehold and inheritance in executory devises remain in the testator and his heirs, till the event happens. As if A devise lands to trustees for 500 years, in trust to pay an annuity to T, his eldest son for life, remainder to T's eldest son in tail, remainder over in fee, (not born at the testator's death) this the court held to be a good executory devise, there being no preceding freehold to support it as a contingent remainder; for the freehold must vest either on the birth of such son, or on T's death, without having had a son, and the freehold in the mean time descended to the heir at law.

2 Fearne, 18,
75, 142611.—
Gore v. Gore,
2 P. W. 28.

ART. 19. *Principles of abeyance &c.* § 1. These principles have a natural connexion with these executory interests. It is understood that the doctrine of *abeyance*, and as to estates commencing in *futuro*, has ever been adopted in this State,

Is where no
one is in *esse*
in whom the
freehold is
vested, 1
Cruise, 16.—
2 Inst. 342.

СН. 114. though the reasons of the rule of law have in a great measure
 Art. 19. ceased ; for they were founded almost entirely in the notions
 of estates passing by livery of seizin, and in feudal principles,
 scarcely known but as legal history in New England or the
 United States.

Watkins, 131. § 2. By the feudal law the freehold could not be vacant or
 —Co. Lit. 1, in *abeyance*. The law required there should be a tenant able
 2.—1 Cruise, to fulfil the feudal duties, and against whom the rights of
 16, 191. others might be maintained. But though the general doctrine
 has been that the freehold could not be in *abeyance*, but should
 be actually in some one, yet there have long been exceptions
 to this rule in England. As where the parson has died, the
 glebe has been in *abeyance*, until a successor has been named.
 2 Bl. Com. And it may be in *abeyance*, there being no person in *esse* in whom
 107.—Co. it can abide. As a grant to A for life, remainder to the heirs of
 Lit. 842.— B, as B can have no heirs while he lives, the fee or remain-
 1 Com. D. der cannot vest in his heirs, but is in *abeyance*, or in waiting,
 103.—Hob. during the life of B, or in *nubibus*, and stands solely in con-
 338. sideration of law ; but according to more modern authorities,
 the word *heirs* may often mean children, who may immedi-
 ately take as purchasers, though their father be living. Though
 the freehold cannot be in *abeyance*, the reversion may.

1 Cruise, 19.

Hob. 338.— § 3. The law does not admit estates to be in *abeyance*, but
 2 Rol. 333, in cases of necessity ; therefore, it has been adjudged that the
 506.—Hob. statute of uses does not execute uses in *abeyance*. Nor can a
 153.—1 Com. freehold be in *abeyance* by the act of the party ; therefore, if
 D. 104 — a man make a lease for years, remainder to the right heirs of
 1 Cruise, 16, B, who is alive, the remainder is void ; for the lease puts the
 19. possession of the estate at least out of the lessor and vests no
 freehold estate in any one.

1 Wils. 176, § 4. And in a lease for lives, if the *habendum* be from the
 Denn v. day of the date, the lease is void ; for it is a freehold to com-
 Fearnside.— mence in *futuro*. But now the words "*from the day of the*
 2 Wils. 165. *date*," may mean inclusive or exclusive, according to the sub-
 —Cowp. 189. ject matter, to support and not destroy parties' deeds. See
 before, Dute &c., Ch. 27.

2 Wils. 75.— § 5. But a release being void as conveying a freehold to
 Cowp. 601, commence in *futuro*, the court held, it should operate as a
 Wilkinson v. covenant to stand seized to uses.
 Tranmer.

2 Bl. Com. § 6. In executory devises an estate vests only in *futuro*,
 172, 173.— and on a future contingency, and in the mean time the estate
 2 Fearn, 1 descends to the heir at law ; as if one devise land to a *feme*
 to 4, 12 to 16, *sole* and her heirs on her day of marriage, this freehold com-
 74 to 78, 324. mencing in *futuro* is good in a will, though void in a deed (see
 —Cro. Jam. Wallis v. Wallis, a. 10 ;) as by a will it must pass, if at all,
 593.—3 Salk. without livery of seizin, it may commence in future. The
 131.—Salk. main reason why it cannot commence in *futuro* in other cases,
 136, 231.— 8 Co. 187.—
 3 D. & E. 143.

is, the necessity of livery of seizin, which can only operate in *presenti*. And as it may thus commence in *futuro*, there is no need of a particular estate to support it; the only use of which is to make the remainder, by its unity with the particular estate, a present interest. And as such a devise cannot be a present interest, it cannot be barred by a recovery suffered before it commences. In this kind of devise there may be a fee after a fee, but a fee cannot support a fee, nor can a conditional fee.

CH. 114.
Art. 19.

Richardson
on Wills, 67,
68, 72.

§ 7. In conveyances on the statute of uses "the fee remains in the grantor and his heirs, until the contingency happens;" but it was not so in the conveyances by livery of seizin, but the remainder in fee of an estate depending on a contingency was in *abeyance*; as where a feoffment was made for life, the remainder to the right heirs of J. S., who was then alive, the fee was supposed to be in *abeyance*, until J. S. died. Co. L. 342. "This founded on an ancient principle of law, that every remainder must pass out of the grantor at the time of livery." But it has been otherwise, in conveyances on the said statute of uses. "It was always a rule the fee remains &c., as above. Carth. 262, 263, David v. Speed. And it seems the case of a devise is the same as that of a use. In Purefoy v. Rogers, Sampson Shelton, October 26, 1648, devised to his wife for life, his lands, and if she should have a son and his name be called Sampson Shelton, then to him after her death, and if he died before twenty-one; then after her death to the testator's heirs forever. Held, the fee was not in *abeyance*, but "that the reversion was in the heir of the devisor by descent," of course, till the son was born, and as before one was born the testator's heir at law conveyed to her and her second husband in fee, her life estate merged in the reversion, and the contingent remainder to her son was destroyed, as after such merger of her life estate there was no freehold to support such a contingent remainder.

2 Saund. 382,
Purefoy v.
Rogers.

§ 8. A devises to his wife for three years, remainder to his only son for ninety-nine years if he so long live, remainder to him for other ninety-nine years, if his future wife live so long, remainder in tail to his heirs, remainder over in fee. Held, the devise to the heirs of the son's body is a good executory devise, being to take place in *futuro*, and within the compass of lives in being at the time of the devise, and not a contingent remainder, as there was no freehold created to support it. The remainder over vested, if to persons in being, and was not in *abeyance*, but if to persons not in being, when the testator died, the remainder descended to his heir at law, and also was not in *abeyance*. These English principles in regard to estates in *abeyance* we have adopt-

1 Wills. 225,
Doe v. Carlton, cited 6
Cruise, 518.

See Gore v.
Gore, 6
Cruise, 519.

CH. 114. ed in the United States, and they are material to be attended
 Art. 19. to in all our claims and conveyances of real estates. Thus the

English law, as to uses and trusts has existed for centuries, and varying materially from time to time; and also further materially varied here by our statutes, which in many respects have put real estates on principles essentially different from those of the English law. So the profits descend to the heir in such cases as above mentioned.

6 Cruise, 519.

2 Bro. C. C.
 166, Lawson
 v. Copeland.
 —5 Ves. jr.
 839.—1 Eq.
 Ca. Abr. 125.
 —3 Ves. jr.
 565, Rowth-
 v. Howell.

§ 9. *Trustees guilty of negligence, the effect &c.* As if an executor neglect to call in or sue a bond debt, he will be charged with the amount. *Powell v. Evans*, 1 Bay, 304, *Ash v. Ash*. So if a trustee misbehave, he loses his costs. 2 Ves. jr. 191, *Ball v. Montgomery*. But if an executor deposit monies in the hands of the testator's banker, solvent at the time, but afterwards become insolvent, the executor is not chargeable with the loss. 5 Ves. jr. 331, *Bacon v. Bacon*; 6 Ves. jr. 226, *Adams v. Claxton*. See a, 17, s. 16.

4 Ves. jr. 101,
 Young v.
 Combe.—
 1 Wash. 246.
 —2 Vern. 548,
 Lee v. Lee.—
 10 Mod. 21,
 Brown v. Lit-
 ton.—1 Eq.
 Ca. Abr. 398,
 Bromfield v.
 Wytherly.—
 12 Mod. 560.
 —See a. 17,
 s. 16.

§ 10. A trustee shall pay interest where he has been guilty of neglect in not putting out money, or where he has made use of it himself. 4 Ves. jr. 620, *Pietz v. Stace*; 12 Ves. jr. 938; 1 Bin. 194, *Fox v. Wilcocks*; 2 Bin. 300, *Guier v. Kelly*. So if a trustee or executor makes interest, he is accountable for it, though not empowered to put at interest. 3 Bro. Ch. Ca. 73. And if a trustee employ trust-money in trade, and make above legal interest, he is accountable for all the profits made. 2 Br. Ch. R. 430. But in a later case held, so accountable only where insolvent when he so employs it or put it into the funds &c., for then he runs no risk if a loss happens. But this reason does not hold in our cases where the trustee or executor gives security to account fully; then it seems generally, as he runs the risk of loss, he shall have the profits. Also 1 Salk. 290; 1 D. & E. 690; but see 2 Atk. 106, 613; 2 Ves. 85; Amb. 219.

3 Br. C. R.
 147, Hutch-
 inson v. Ham-
 mond.—
 2 Atk. 121,
 Harrison v.
 Harrison.—
 4 Ves. jr. 620.
 —5 Ves. jr.
 794, 800.—
 12 Ves. jr.
 402.

§ 11. *As to the funds*, if an executor vest monies in them he is not liable if the stocks fall, as the court, if applied to, will make the same appropriation. But this must depend on circumstances. But if a trustee sell stock contrary to his trust, the *cestui que trust* may elect to have it restored or the produce of it paid. But if for the benefit of the trust estate the trust sell out of one fund and buy into another, or transfer the money from one real security to another, the property continues unaltered, and he is not chargeable. The above election was decreed in *Pocock v. Reddington*, to have the stock replaced, or the money produced by the sale of it, with interest at five per cent. or more, if more had been made, and costs occasioned by the misconduct and breach of trust: he sold

out such stock to make loans to his friends on their bare notes and they failed.

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Art. 21.

§ 12. *Cases in Pennsylvania, as to trustees.* Held, a trustee is entitled to interest on advances made for the benefit of the *cestui que trust* to supply the deficiency of the trust fund : so to an allowance for depreciated paper-money paid to him for the rent of the trust estate, and for his expenses in erecting proper and necessary buildings on it, though the *cestui que trust* is not consulted, and he has a *lien* on the trust estate for them. 1 Bin. 126, *Frazer's lessee v. Hallowell*.

1 Bin. 488,
Dilworth v. Sinderling.—
1 Bin. 136.—
1 Wash. 226,
Sallee v. Yates.

ART. 20. *General principles.*

It will be proper, in this place, to consider the general principles of remainders and reversions, as far as they are naturally included in conveyances, and are the subjects of them. Remainders and reversions constitute an essential portion of those executory interests or estates, which are involved in most kinds of complex conveyances, especially to uses and in trusts. And our covenant to stand seized to uses not only involves remainders, but almost all kinds of estates, vested, contingent, or executory, in *presenti* and in *futuro*, in *fee*, in *tail*, for *life*, or *years*, in *severalty*, *joint-tenancy*, *tenancy in common*, or *parcenary*. A man by his covenant to stand seized to uses, may vest in the *cestui que use*, in any of these forms, almost any sort of real property ; as a use may be raised to any of these purposes, and then the statute annexes the estate to it. And usually a remainder can be made only out of what would otherwise be a reversion ; but it is settled, that one seized of land in fee may grant out of it a rent charge to A for years, remainder to B in tail, or in fee, though created *de novo*, 1 Lev. 144 ; for as the grantor could grant in fee to one, so he might in parts to several in succession, 9 Co. 48 ; and often in conveyances there arises a question, what estate, if any, in remainder &c. the grantor has.

More as to
remainders,
&c. Ch. 136.

ART. 21. *Remainder—what.*

§ 1. A remainder is created by act of the parties, a reversion by act of law ; and each is an estate in expectancy. Either is an estate to take effect, and to be enjoyed after another estate is determined. As a grant to A for forty years, and remainder to B and his heirs ; here A is tenant for years, remainder to B in fee ; both interests make one estate ; both subsist together, one in possession, the other in expectancy. As a fee simple is the whole estate, there cannot be any estate after a fee. So a remainder is the residue of a particular estate disposed of by the same conveyance, and supposes, 1. A particular estate in being : 2. That individual estate that was made by the same conveyance as the remainder : 3. An existence of this estate when the other goes out of being : 4.

2 Bl. Com.
163, 164.

Gilb. Law of
Uses, 132.—
Doug1. 754,
Goodtitle v. Bellington.—
Co. Lit. 113,
143.—2 Co.
Cholmly's
case.—3 Co.
19, 20, *Boston's case*.

CH. 114. This estate to remain in the same manner it was disposed of.

Art. 21. Or "a remainder is the remnant of an estate in lands or tenements, expectant on a particular estate, created together with the same, at the same time." "A remainder ought to take effect in possession, when the particular estate ends." 1 Co. 120, Chudleigh's case; Noy's Maxims, 31; Plow. 21; 2 Cruise, 259.

2 Fearn by P. 5 to 16.—
3 Bac. 318.—
Cro. El. 269.
—2 Cruise, 313.

§ 2. A remainder, or a reversion, is incorporeal and lies in grant. And it is a settled rule, that if a limitation may take effect by way of remainder, it shall never take place as a springing use or executory devise. Carwardine v. Carwardine, and Goodtitle v. Bellington. Nor can either a remainder or a reversion be surrendered without deed, even at common

1 Saund. 236. law, being estates lying in grant, and not in livery.

May be conveyed by bargain & sale, 4 Cruise, 176; covenant to stand seized, 187; by lease & release, 108.

§ 3. Remainders are vested or contingent, and relate only to lands, tenements, or hereditaments, real or mixed. A contingent freehold remainder ever requires a freehold estate to precede it, and support it; the instant this ends, or sooner, that must vest, or not at all, whether the estates arise on limitation of uses, or are executed in possession at common law. Fearnie, 281, 284.

1 Saund. 236, in Thursby v. Plant, in Williams' notes.
—4 Cruise, 72.

§ 4. But an executory devise is admitted only in wills, and respects personal as well as real estate, and wants not any preceding estate to support it. The common law makes a deed essential to the surrender of things, as remainders and reversions &c. lying in grant. But as to the surrender of estates in possession, a note in writing will satisfy the 29 of Ch. II. c. 3, s. 3, as well as a deed: but not so by our statutes; they provide for recording deeds, and this record is essential to the title generally.

5 Mass. R. 536, Dingley v. Dingley; a vested remainder.

§ 5. In this case A devised lands to his son B for his life, and "that after his decease the premises should be equally divided among and between his sons, to be their property." When the will was made, B had three sons living, after which, and before the testators death, B had two other sons. The court held, this was a vested remainder in the five sons of B. The father of the demandants, one of the five sons, died before the tenant for life B, and they recovered his part. They sued for a fourth, and recovered a fifth with costs. The demandants brought *formedon in remainder*: and held, that in this action they could recover only their father's fifth part, and not what came to them on the death of their uncle, one of the five sons who died without issue, in the life time of the tenant for life.

2 Bl. Com. 314, 315.

§ 6. There are seven essential properties of a remainder:

1. In creating it, the freehold must pass; as if I lease for years to A, and afterwards grant a freehold remainder to B,

livery at common law must be to B, by consent of A, to pass the freehold to B. CH. 114.
Art. 22.

§ 7. Second. Though in common parlance one in remainder or reversion is said to be seized in law, yet strictly he is not, but only has a right thereto; for the seizin, in fact, is in the freeholder and filled by him, and there cannot be seizin in fact in one, and seizin in law in another, of the same estate, at the same time. Watkins on
Descents, 28.

§ 8. Third. There must be some particular estate precedent to the remainder: as a lease to A for 10 years, remainder to B in fee, with livery of seizin to A, (when that was necessary,) here by the livery the freehold is immediately created, and vested in B, the whole estate passes at once from the grantor to the grantees, and the remainder-man is seized of his remainder, at the same time the termor is possessed of his term; this remainder is an estate to all intents, commencing *in presenti*, though to be enjoyed *in futuro*, and when the remainder is contingent, this preceding estate must be a freehold at least. 1 Bl. Com.
166, 167.

§ 9. Fourth. This particular, or preceding estate, must be such as is sufficient to support a remainder, but an estate at will is too slender for this purpose, and more so one at sufferance.

§ 10. Fifth. The remainder must commence, or pass out of the grantor, at the time the particular estate is created.

Sixth. If the particular estate be void in its creation, or is afterwards, by any means, defeated, the remainder supported by it is defeated also.

§ 11. Seventh. The remainder must vest in the grantee during the particular estate, or the instant it determines.

ART. 22. *Contingent remainders, &c.*

This is an executory interest, created in many ways, as by covenant to stand seized, devise, and other modes of transferring property from one to another, to vest on a future contingency, in one or more persons, and for a longer or shorter time; as in the many cases mentioned above. And, as where a grant is made to A for life, and remainder to B's son *unborn* in tail, for life, or in fee, this interest granted to the son is contingent, executory, and not vested, nor can it be till such son is born, and if not born before the life estate ends, the remainder is gone forever; for the particular estate and remainder, however created, are but one estate in law, and must unite so that no other estate can possibly come between them. A remainder is vested or executed whereby a present interest passes to the party, or contingent where no present interest passes. As to contingent remainders the rules are, 2 Bl. Com.
167, 171.

§ 1. First. They must be limited to uncertain persons, as

CH. 114. to A for life, remainder to B's unborn son; but the moment a
Art. 22. son is born, the remainder vests. This uncertain person must
 be such a one as may by a common possibility be in existence
 as soon, or sooner, than the particular estate ends. Hence if
 to A for life, remainder to the right heirs of B, and there is
 no such person as B in *esse*, the remainder is void; for here
 two contingencies must happen: 1. Such a person as B is to
 be born: and 2. Die during A's estate, which is a remote
 possibility.

Potentia remotissima.

2 Cruise, 302;
 cites Fearn, 378.

Fearne by P.
 4.—Pow. on
 D. 267 to 271.

§ 2. Second. Contingent remainders may be to certain persons, but to take effect on uncertain events. As if I grant to, or covenant to stand seized to the use of A for life, and if B survive him then remainder to B in fee. So a remainder may be contingent, because the person to take is not ascertained, though the event must take place, but may after the particular estate is ended, as a devise to, or covenant to be seized for the use of J. S. for life, remainder to the right heirs of J. D.; now as there can be no such person as the right heir of J. D. till his death, if J. S. die, and his estate end, before the death of J. D., and so before his heir can be ascertained, this remainder is contingent and void, as before it can vest the particular estate terminates.

3 Salk. 209.

§ 3. Third. Contingent freehold remainders must be supported by particular estates of freehold; for when the remainder is created, the freehold must pass out of the grantor or deviser, and it cannot pass out of him without vesting somewhere, and in this case of a contingent remainder, it must vest in the particular tenant, or no where, and if his estate be not a freehold, it cannot vest in him, and of course the remainder is void. Every conveyance that creates such a remainder must create a present freehold.

1 Mod. 92.

§ 4. Fourth. By putting an end to the particular estate, a contingent remainder is destroyed, if not vested. As if A be tenant for life, remainder to his eldest son in tail, unborn, and before a son is born A dies, aliens, or surrenders, the remainder is defeated. It is then necessary to have trustees appointed, to preserve contingent remainders, in whom there is vested an estate in remainder, for the life of the tenant for life, to commence when his determines by his act, or death, or otherwise.

Salk. 224,
 Loddington
 v. Kims, —4
 D. & E. 84.—
 3 Salk. 299.—
 4 Bac. 3.—3
 D. & E. 484,
 Doe v. Per-
 ryna.

5. Fifth. Where the mean estates are for life, or in tail, the last remainder may vest if it be to a person in *esse*:—but no remainder limited after a limitation in fee can be vested. “And a bare right of entry will support a contingent remainder.” But a future right of action, or a future right of entry cannot support such remainder; there must be a particular estate, “actually in being.”

§ 6. Sixth. *Contingent remainders open, and let in new owners as events happen.* As where a devise was made to Dorothy Comberback for life, remainder to her children and their heirs, (no children then being born) this is a contingent remainder to the children, and will vest in the first child to be born, and open to let in after born children; and it was added, that the court will always lean in favour of vesting estates in such children as may be born, and may have their remainders vested in them before the termination of the life estate, viewed as the most reasonable construction.

CH. 114.
Art. 22.

3 D. & E. 484,
Doe v. Per-
ryn.

So where an estate is thus given to unborn children, as contingent remainders, or executory devises, it opens and lets in children born before the estate for life or in tail ends.

Cowp. 309,
Baldwin v.
Carver.

§ 7. Seventh. *A remainder is never contingent where it can be considered as vested.* The law favours vested interests: and what is a vested interest, and so conveyable. A devise to A when and as soon as he arrives to twenty-four years of age, is a vested interest, and only the possession is postponed; but a devise to him, if he arrive to that age, is not a vested interest, but a mere contingency, which if he die before that age, will not go to his heir; and the same rule holds in respect to a legacy. See Ch. 135, a. 5, s. 23, 24, 25.

Fearne, 222,
224, by Pow.
—1 Burr. 228.
—3 D. & E.
41, 44, Doe
v. Lea. —
3 Co. 19.—
3 D. & E. 88.

§ 8. *Vested remainders.* An interest devised or granted on an event certain, as the death of A, is vested immediately. As where B, seized in fee of a reversion on a fee tail in C, devised the lands to D after the failure of B's issue, the court held, this was an immediate devise of the reversion, expectant on the fee tail estate, and good. "It is a present interest, expectant as to the possession, capable of being barred, and so valid." This was a devise to Peter in fee, after several estates in tail, yet it was adjudged to be an immediate devise of the present reversion—an estate is devised immediately to Peter to be enjoyed in *future*.

Salk. 232,
Badger v.
Lloyd, cited
6 Cruise, 466.

Pow. on D.
269.

§ 9. *A possibility coupled with an interest is grantable, and a vested interest.* As where John Lockyer devised the land subject to certain annuities to Thomas Lockyer, till his son John, or any other of his youngest sons attained the age of twenty-one years, and if no younger son attained that age, but only one son should attain that age, then till such only son attain that age in trust &c. "And when, and as soon as so my said nephew, John Lockyer, or any other of the younger sons of said Thomas, born, or to be born, shall attain the age of twenty-one years, then I give (the premises) thus charged as aforesaid, unto my said nephew, John Lockyer, or unto such other son as for the time being shall be a younger son of my said brother Thomas Lockyer, and shall first attain his age of twenty-one years, and to the heirs and assigns of

3 D. & E. 88,
Jones v. Roe.

CH. 114. such younger son forever," and if but one son to him in fee,
 Art. 22. and if no son, to Thomas Lockyer in fee. October 22, 1734,
 the testator died, leaving said Thomas alive, and his heir at law, and his only two sons, Joseph Tolson Lockyer and John Lockyer, then alive. June 6, 1751, said John, the son, died, under the age of twenty-one years. Joseph T. Lockyer, under whom the plt. claimed, married February 26, 1752, Mary Perry, and September 26, 1759, devised all his estate of what nature or kind soever in possession, remainder, or reversion to his said wife forever, and died March 1765. Thomas Lockyer entered, Oct. 23, 1734, on the death of the first testator, and continued possession till his death in 1785, when the said wife got possession. Judgment was rendered for her, and this was affirmed on the ground that Joseph Tolson Lockyer had a possibility or contingency that was devisable. In this case many authorities were cited.

2 Fearn, by P. 389,
 Southby v. Stonehouse.
 —2 Vesey, 75, 610, 612.
 —Mod. 211.
 Dougl. 767.—
 6 Cruise, 508.

§ 10. So where the profits of land were devised to the husband for life by his wife, and after his death her said estates to go "to her children, if she should have any to survive her, but in case she should leave no child or children, nor issue of such child or children, and after the death of her husband she gave the estates to J. K., making him her sole heir, in default of issue left by her." The court decided, that the children took estates in tail only; "and that the devise to J. K. was a vested remainder:" that here is the common double contingency which there is in case of every limitation in remainder, after an estate tail, viz: there being no issue at all, or all such issue dying without issue."

Chris. Notes.
 —2 Bl. Com. 20.

§ 11. Difference between an estate vested and executed. As when an estate is given to A for life, and after his death to the heirs of his body, this remainder is vested in A, and is executed. But "when an estate is given to A for life, then an estate is given to B for life, or in tail, then the remainder to the heirs of the body of A, this remainder is vested but not executed, because of B's intermediate estate.

3 D & E. 488,
 489, Ives v. Legg, cited 2
 Cruise, 28.

§ 12. If there be a devise to A for life, remainder to B in tail, and remainder to C in fee, C in this case has a vested remainder, and the court said, "as the court never construes a limitation into an executory devise, when it may take effect as a remainder, because the former puts the inheritance in *abeyance*; so neither does it construe a remainder to be contingent, where it can be taken for vested; because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by fine or feoffment."

Cro. Car. 185,
 Spaulding v. Spaulding.—2 Fearn, by P. 307.—6 Cruise, 456

§ 13. *A remainder contingent on an estate tail.* As where

John Spaulding had three sons, John, Thomas, and William, and devised lands to John (the eldest) and the heirs of his body, after the death of the testator's widow, Alice, and if during her life John died, William to be his heir; devised other lands to Thomas in tail, and if he died without issue, John to be his heir; devised other lands to William in tail, and if all his sons died without heirs of their body, then his lands to be to his brother's children; John died, living Alice, and left a son; she died, and William entered on John's son. The court held the true construction was, that if John died without issue, living Alice, then William should have the land; for it appeared by the will that each son had an estate to him and his issue: that there was an express limitation to John's issue, not to be abridged by omitting the words *without issue*, as applied to his death. Here an estate tail was expressly given to John and it continued. The remainder was contingent, for it depended on the contingency of John's dying, living Alice; so not a remainder vested after an estate tail expended, as was the case of *Southby v. Stonehouse*. And a fee tail may well support a contingent remainder, though a fee simple cannot, for there is no remainder: nor can a fee conditional, for while it lasts it is equal to a fee absolute, and leaves no remainder; nor a term for years.

CH. 114.
Art. 22.

2 Fearné,
124.—3 Wils.
144.—3 Salk.
299.

§ 14. So if A, seized in fee, give no particular estate, but devises an estate to B, after the failure of C's issue, this is a future gift, and cannot be a present interest expectant; for there is no prior or particular estate on which this devise to B can be expectant, nothing that makes the vesting of the interest precede the possession.

2 Fearné,
125.

§ 15. If there be a devise to B for life, remainder to C for ninety-nine years, if he live so long, remainder to the heirs of his body after the deaths of B and C; this last is a contingent remainder, and not an executory devise, and is defeated by C's surviving B, there being no preceding freehold to support it after B's is ended.

3 D. & E. 763,
Doe v. Morgan.—
2 Cruise, 321,
335.

§ 16. Eighth. *A contingent interest is ever a remainder where it can be*: that is, wherever limited "to depend on an estate of freehold which is capable of supporting a remainder. This rule, said Lord Kenyon, is fixed and certain:—was early established in *Purefoy v. Rogers*, 2 Saund. 384; *Carth. 309*; 2 Vesey, 610; 3 Wils. 245, 246; Salk. 236, and in many other cases; but this supporting freehold must be by the same conveyance.

3 D. & E. 765.

Though a vested remainder after a life or tail estate, is devisable or grantable in fee, in tail, for life or years, in whole or part, yet a contingent remainder is not; as one to the heirs of A, he being alive, so long as he lives. And a remainder may pass by the name of a reversion, and *e converso*.

3 Salk. 129.—
5 Wood's
Con. 21, 25,
26, 33.—
Fearné, 222,
232.

CH. 114.
Art. 22.



Dougl. 486,
Doe v. Fon-
nercau.—
Fearn, 222.
—2 Cruise,
331.

§ 17. But a contingent interest may be a contingent remainder or an executory devise according to events, till some prior contingent freehold vests; but as soon as this prior contingent freehold vests, the quality of all the contingent interests thereon are fixed.

§ 18. Ninth. Double contingencies leave the estate open till one happens. Thus a devise is made to the heirs male of A's body, from and after his death; and in default of such issue to B, this is a good executory devise, vesting in possession in B, or as a remainder on estate tail. A's life estate created by deed, and this estate tail created by a will cannot unite: but 1. If A die, leaving issue male, then the estate to B takes effect immediately as a remainder expectant on said estate tail, and is barrable by a recovery, and so not tending to a perpetuity: 2. If A leave no son, then it is an executory devise to B, at A's death without issue male, and this is within the legal time; cited the next case.

Fearn, by
P. 496, 513,
Hopkins v.
Hopkins.—
2 Cruise, 329.

§ 19. In this case Lord Talbot decided in favour of the intent, that a limitation which in one event would have operated as a remainder, but which did not happen, should operate as an executory devise; this he said he did on principle without precedent. To trustees and their heirs to their use in trust for &c. is a trust.

Fearn, 142,
389, 391, 497,
521, Browns-
word v. Ed-
ward, cited
6 Cruise, 502.

§ 20. And in another case the court resolved, that "a devise may operate either way according to the event." This was on a devise to two trustees and their heirs to receive the rents till B attained twenty-one, and if he attained that age, or had issue, then to B and the heirs of his body, but if B died before twenty-one, and without issue, then remainder over. B attained his age of twenty-one, and afterwards died, without issue. Lord Hardwicke considered the word "and" as used for *or*, and the condition not as *disjunctive*, but as *copulative*, and decreed that the remainder over should take effect, "either in default of B's attaining twenty-one, or on his dying without issue."

Dougl. 498.

§ 21. In contingent interests when the first estate vests in possession, all that follow vest in interest at the same time, and so cease to be executory. In Doe v. Fonnercau the sons of A, if any, would have taken by purchase.

§ 22. It will be observed that in neither of the above cases was there any freehold estate created to precede the contingent or executory interest; hence it did not become a contingent remainder, for want of such a freehold to support it; and therefore when the first of the double contingencies, or more properly the first of the two contingencies, happened, and which finally fixed the interest, it might well take place as an executory devise. But according to the authorities it

had been otherwise, if such a prior freehold estate had been created; and so even if a term for years had been created to come between such freehold and the contingent interest, according to the next case. CH. 114.
Art. 22.

§ 23. As where A devised to his wife for life, the remainder to his son Ebenezer for ninety-nine years, if he lived so long, and after the several deaths of the said wife and son, to the heirs of his body; the court held, this remainder to the heirs of Ebenezer's body to be a contingent remainder, and not an executory devise, though it was urged that the interposing term, for ninety-nine years, between the remainder to the heirs and the wife's life estate, took it out of the general rule above stated, and that it was defeated by Ebenezer's surviving the wife, as her life estate ended while his term existed, and before he could have such heirs, and so before the remainder could vest. But could it have been construed an executory devise, the issue of Ebenezer would have taken. In *Hopkins v. Hopkins*, the devisee, who had the preceding freehold, died in the testator's life time, and so an executory devise to others. But had this devisee survived the testator, the after contingent interests had been contingent remainders, fixed by such freehold's once taking effect. If Ebenezer, the son, had died before the wife, then her life estate and that to his heirs had joined, or come together; and for this possible junction, perhaps the interest to the heirs was deemed a remainder. But the effect of an interposing estate does not seem to be well settled. Blackstone states that the particular estate and the remainder must unite so that no estate can possibly come between them; this may mean no estate created or existing by descent or by another conveyance.

§ 24. If any interest or portion of time come between the preceding estate and the remainder, it is not strictly a remainder. As where A leased to B for forty years, if A lived so long, and after A's death to C for a thousand years, this is properly no remainder to C. It cannot vest in possession at the end of the forty years, as A may outlive that time, and so a part of his life interpose between the two terms; during which time of his life's thus interposing there existed in the grantor a reversionary interest not created by the conveyance that created the two terms. The term for a thousand years cannot be a contingent remainder, for there is no particular estate to support it; nor can it vest when the particular estate ends, for that reaches not the remainder; nor is the remainder limited with any regard to the particular estate; because not to commence on its termination; but at a *future* time, namely, A's death. And there is no contingency at all in the case; for the term of a thousand years, takes ef- 3 D. & E. 763,
Doe v. Morgan; cited 2
Fearne, 14,
16.—2 Cruise,
335.

4 Bac. 207.

CH. 114. fect at all events; that is, on A's death, an event certain in law, be his death before or after the end of the forty years. **Art. 23.** Still C had a vested interest, and recovered it, and in a will it would have been a future vested interest. But in *Doe v. Morgan*, the three estates to the wife, to Ebenezer, and to his heirs, created by the same deed, made one estate.

4 Bac. Abr. 307.—10 Co. 85, Lovie's case.—2 Cruise, 442. § 25. An estate may be a contingent remainder, (by lease,) in one event, and not good in another. As a lease to B for his life, and after the death of A to remain to B and his heirs, this remainder to B and his heirs is void as a contingent remainder, if A survive B; for thereby a part of A's life comes between it and B's life estate. But it is good if B survive A, for then the life estate of B and this remainder to B and his heirs come together. And if one day come between the freehold and contingent remainder, it is turned into an executory devise. **4 Ves. jun. 227**, as to limited time.

2 Fearn, 22; & Duke of Norfolk's case, 353, see Thelluson v. Woodford. § 26. So a term for years may, by executory devise, be devised to A for years, to B for life, and to B's son unborn at the testator's death, and be valid, if B have a son at his death; for the executory interest vests in B's son in the life in being when the will was made, and before it ended.

Fearn, 29, Cotton v. Heath. § 27. Remainder in goods after a life estate. As where one, A. D. 1692, bequeathed goods to A for life, remainder after her death to B, this bequest to B is good, and on a bill in chancery he may compel A to give security that the goods be forthcoming at his death. And the court held, that it is all one whether the goods, or the use of the goods were bequeathed for life. And in a late case the devisee for life was compelled to sign an inventory of the goods to be accountable for them subject to the use.

Fearn, 33, 34.—Freem. 206.—And Hyde v. Parrott, 1 P. W. 1.—Vachel v. Vachel.—Cowp. 432. **ART. 23. How contingent estates may shift or cease in part.** § 1. In this case a husband was seized in fee of a copyhold, and surrendered to the use of his wife, and of B, for their lives; remainder to the use of the heirs of the bodies of the husband and wife. The wife and B were admitted. Then B surrendered his part to the use of the husband, and he surrendered all the estate to the use of C and his heirs, and C was admitted. The wife died leaving issue, who sued to recover her moiety, and failed. And eight points were decided: 1st. When B surrendered his moiety to the husband's use, the joint-estate between B and the wife was severed, and she became seized of a moiety for her life, as tenant in common, and the other moiety of the preceding freehold was in common for B's life.

4 Bac. Abr. 317, Lane v. Pannel.—2 Cruise, 341.—1 Roll's R. 238, 317. § 2. Second. When the husband surrendered all to C in fee, he had an estate for the life of B in one moiety, and in the other for the wife's life, by her husband's surrender.

§ 3. Third. When she died first without having defeated CH. 114.
that surrender, as to her part, C's estate in that ended, and the Art. 23.
preceding freehold as to her moiety ceased, before the contingent remainder thereon could vest, as he who claimed it must be heir of the bodies of both husband and wife, and heir of the husband he could not be, *quod non hæres viventis est*.

§ 4. Fourth. So this contingent remainder was destroyed, or ceased as to that moiety, and half of his remainder failed, and the husband's death could never revive it.

§ 5. Fifth. But as to the other moiety for B's life, the moiety of the contingent remainder resting thereon took place on the husband's dying in B's life time, and so the heirs of the husband and wife's bodies were ascertained, and in a condition for this contingent interest to vest in them, before the prior freehold for B's life terminated.

§ 6. Sixth. The husband by his surrender to C and his heirs, did not so forfeit his estate for life as to give an entry to those in remainder; for had that been the case, the contingent remainder of the whole had been destroyed.

§ 7. Seventh. Had the wife survived, and defeated the surrender of her husband to C, as to her moiety, this would not have revived the moiety of the contingent remainder resting on her moiety; and when her said moiety terminated, that moiety of the remainder was incapable of vesting.

§ 8. Eighth. Such surrender of the husband operated only as a grant, for what he might lawfully pass, and not as a livery of seizin, which would have worked a forfeiture of his estate for B's life, bought of him as above stated.

But according to the principles of the above case, had two such moieties, one for A's life, and one for B's life, been originally created, with a contingent interest after, to some person not born &c., and such person had been born during said lives, this interest would have vested in interest on such birth; and in possession in moieties, as the said life estates in the moieties had terminated; for the two life estates, one in each moiety, being created together with the contingent interest, by one instrument, and the person to have the contingent interest being born and capable of taking during the two lives, it is a reasonable and legal construction of the instrument, according to the intent, and not against any rule of law, to consider this contingent estate to vest in interest and in possession, in one moiety, on the death of one tenant for life, and in the other moiety on the death of the other.

§ 9. *Contingent remainders* are destroyed whenever the prior estate, whereon they depend, ceases to exist. And it seems to be a general principle, that if one be tenant in tail when he suffers a common recovery, it is valid and defeats

Fearne, 61,
67, by Pow-
ell—Cowp.
379, Driver v.
Edgar.—2
Bac. 60, Foun-
tain v. Gooch.

CH. 114. all contingent remainders thereon, though afterwards he ceases to be tenant in tail by the happening of any event, the occurrence of which was intended to terminate his estate in tail. The conditional limitation that defeats this estate comes too late to destroy the effects of the recovery, after it is suffered by one, tenant in tail at the time of suffering it. As if an estate tail be to A, and determinable on his non-payment of £100, remainder to B in tail, and before the day of payment, A suffers a common recovery, and after fails to pay, yet because he was tenant in tail when he suffered the recovery, all is barred. By his recovery he actually destroys the contingent remainder, as much as if there had been no such conditional limitation, and this remainder, so destroyed, is gone forever.

The particular estate and remainder are so far one estate, that if a person release his interest in one of them he releases it in the other; and if he confirm the remainder, he cannot enter and defeat the particular estate whereon it depends; for if he could, it would be indirectly defeating the remainder he has confirmed; but one by confirming the particular estate does not confirm the remainder, as that may well exist without it.

6 Cruise, 415,
418—4 T. R.
710, Atherton
v. Pye.—
4 Cruise, 459.
—6 Do. 414.
—1 Salk. 226.
—2 Stra. 996.

ART. 24. *Cross-remainders &c.* § 1. The general principle is, that there cannot be cross-remainders among more than two by implication. But there have been exceptions to this rule. As where A devised "to all and every the daughter and daughters of the body of B, and the heirs male of the body of such daughter or daughters equally between them, if more than one as tenants in common, and for default of such issue, he devised all his said lands to C." The court held, that the daughters of B took cross-remainders; that is, such remainders among more than two by implication; and the apparent intention of the testator, and the same being in a will. They arise but in a will by implication where necessary words are wanting. *Comber v. Hill*, 2 Stra. 996.

5 T. R. 427,
Doe v. Wainwright, and
518, *Doe v.*
Dorvell.
Not implied
in a deed, but
may be in
articles.—
4 Cruise, 461,
464.—6
Cruise, 414,
415, 418.—
Dougl. 53,
note.

§ 2. So in a conveyance by lease and release to feoffees and their heirs, to the use of Mary Warner for life, as to half, and as to the other half, and as to the other moiety, as also the half limited to her for life, after her death to Richard Abel and Elizabeth, his wife, for their lives and the survivor; then to the use of Mary Abel for her life, and after her death to the use of such child or children as she should thereafter have as tenants in common in tail, and if any such child or children should die without issue of his or her body, then his or her part to remain to the use of the surviving child or children of said Mary Abel in tail, and if all died without issue, then over. The court held, that the children had cross-remainders, and when one died without issue, his part went to a surviving child, and to the child of a deceased child.

§ 3. "The presumption of law is in favour of cross-remainders between two only; and against raising cross-remainders between more than two. But the presumption in either case may be rebutted by manifest circumstances of intention, apparent on the face of the will." 2 Stra. 996, Williams v. Brown; 6 Cruise, 417. CH. 114.
Art. 24.
Cowp. 777,
Perry v.
White.

§ 4. Devise to two brothers and to a sister, and to the heirs of their bodies as tenants in common, and for want of such issue, to his own right heirs. He then gave all the rest of his estate equally between his brothers and sister, share and share alike. Held, the devisees took cross-remainders. The heir at law was to take only on failure of all such issue. Cowp. 797,
Shepherd v.
Mansfield in
chancery.

§ 5. So it is in favour of cross-remainders, when the deed or devise only gives over the whole estate on failure of all the various branches named; for when it appears the intent is the estate is not to go over, so long as any of the branches mentioned remain, and as naturally one must die off and fail after the other, the estate on the principle of cross-remainders must finally rest on the surviving branch. There can be no dower or curtesy of a remainder or reversion. But the Colony law of Massachusetts allowed dower in each in certain cases. Cowp. 31,
Wright v.
Hollford.—
Loft, 443,
cited.—
6 Cruise, 420.
—2 Cruise,
420, 421.—
Watkins, 111.
—Mass. Law,
964.

§ 6. The life estate may be destroyed and not affect the contingent remainder, if there be a vested remainder in tail in being, for that will support a contingent remainder. 4 Bac. 315.

§ 7. *Remainders in the alternative.* Chevall devised to his wife and daughter for their lives and to the survivor; but if the daughter married and had issue of her body, then after the wife's death to said daughter in fee; if she died unmarried and without issue, to the wife in fee; testator died, leaving his wife and daughter, then the wife died, and then the daughter suffered a common recovery and died unmarried; the wife's heir sued. The court held, the wife and daughter took joint estates for life, with contingent remainders in fee simple to each in the alternative; that the remainders were destroyed by the recovery by tenant for life, and that the words confined the failure of issue to the daughter's death. Douglass, 763,
Goodtitle v.
Billington.—
1 Wils. 106.—
2 Fearn, by
P. 38.

§ 8. Is a remainder and not a reversion, wherever heirs take an estate by will different from what they would take by descent. As on a devise to B of his estates, and the issue of his body as tenants in common, and in default thereof, or if issue, and all died under twenty-one years of age and without issue of any of them, then over; the court adjudged that B had only a life estate, and that all the after limitations to her heirs were contingent and destroyed by her recovery. Issue taking as tenants in common took an estate different from what would have descended to them, and if she had left issue they had taken a fee by reason of the word "*estates.*" So a con- 6 T. R. 30,
Doe v. Burn-
sell.

CH. 114. tingent fee resting on B's freehold ; and as that was destroyed before the fee took effect, that was also destroyed.

Art. 24.

6 T. R. 92.
Habbergham
v. Vincent,
cited 2
Ferne, 117,
121, 123.

§ 9. Limitations created in part by one deed, and in part by another, cannot be consolidated. See *Doe v. Fonnereau*, post.

H. devised estates to trustees and their heirs to the use of his granddaughter, without impeachment of waste, daughter of his heir at law, remainder to trustees to preserve contingent remainders, remainder to her first and other sons successively in tail male, remainder to her daughters as tenants in common in tail general, remainder to the use of such persons and for such estates as the testator by deed &c. should appoint. By deed he recited the will and appointed the estates "after the death of his granddaughter and failure of her issue," to the use of the first and other sons of his heir at law successively in tail male, remainder to his daughters as tenants in common in tail, remainder in default of such issue to the use of the right heirs of the survivor, of his said trustees, his heirs and assigns forever.

Testator died, leaving his heir at law, and his said daughter, and all the trustees alive ; she died without issue, living the heir, he died, leaving only one trustee alive and without issue. The court held, the instrument reciting the will and appointing the estates was a deed, and not a will, and that a series of limitations created in part by one deed and in part by another, could not be consolidated, as one to A for life in one deed, and to his heirs in another deed, they could not be coupled or have the same effect they would if in one deed. Here the limitations in the will ceased on the daughter's death without issue, and those of the deed whether springing uses or executory devises were too remote, taking effect only on a general failure of issue of the daughter.

2 East, 36,
62, *Watson v.*
Faxon.—
6 Cruise, 415,
Gilbert v.
Witty.

§ 10. Cross-remainders among several by plain intentment. As on a limitation (after estates for life to A and B) of "all and every the said premises to all and every the younger children of B begotten, or to be begotten, if more than one equally to be divided amongst them, and to the heirs of their respective body or bodies, as tenants in common &c. ; and if one only child, then to such only child and to the heirs of his or her body issuing ; and for want of such issue" followed a devise of "the said premises" to C. N. &c. with several limitations over ; "and for want of such issue" the testator divided the said premises between several branches of his family. Held, that cross-remainders were to be implied among the younger children of B, from the plain intent of the testator from the whole of the will, though the word *respective* was used ; for the said premises were to go over to C. N. ; that

is, as the court said, all the said premises at once ; hence, all the estates of the said children must fail before any estate was to go over to him. The rule in *Perry v. White* was recognized. CH. 114.
Art. 25.

§ 11. A having three sons and seven daughters, devised to his sons in succession for life, remainder to the heirs males of their bodies, remainder to the heirs female of their bodies ; remainder to all and every his daughter and daughters, (if two or more) as tenants in common, and to the heirs of her and their bodies, remainder to the heirs of the devisor's brother. Held, this devise gave cross-remainders to the daughters. Between more than two the presumption is against cross-remainders ; but this may be controlled by a plain intention to the contrary.

Cook v. Gerrard, many cases collected as to cross-remainders ; besides the above and following, *Cole v. Livingston*, 1 Vent. 224 ; *Holmes v. Meynel*, Sir T. Raym. 454 ; *Spirit v. Bence*, Vaugh. 262 ; *Gardner v. Sheldon*, Sir T. Raym. 453 ; *Denn v. Gaskin*, *Phillips v. Phillips*, *Willis v. Lucas*, *Chester v. Chester*, *Thomas v. Thomas*, in other chapters ; *Marryat v. Townly*, 1 Ves. 104 ; *Davenport v. Oldes*, 1 Atk. 579 ; *Doe v. Dorvell*, 5 D. & E. 521 ; *Counden v. Clerke*, Hob. 34 ; *Fisher v. Wigg*, 2 Ves. 252 ; *Rigden v. Vallur* ; 1 Wils. 341, *Goodtitle v. Stokes*. See also *Doe v. Cooper*, Ch. 129, a. 2.

2 East, 47,
Doe v. Bar-
ville.—Stra.
969, *Camber*
v. Hill.

1 Saund 170,
187.—Cro.
El. 208.

§ 12. Cross-remainders cannot be implied in a deed, and can only be raised by proper words of limitation, however plainly expressed the intentions of the parties may be. No cross-remainders between the daughters or their issue, under a limitation in a marriage settlement to the use of all and every the daughters of &c. to be begotten, share and share alike, equally to be divided between them, and of the heirs of the body and bodies of all and every such daughter and daughters ; and for default of such issue to the right heirs &c.

1 East, 416,
Doe v.
Worsely.—
4 Cruise, 461.

On the whole, after scores of decisions on the ground of cross-remainders by implication, the only rules well settled seem to be these : 1. None by implication in a deed : 2. Among two the judges favour them, but not among more than two. After all the testator's intention when known must govern.

ART. 25. *Sundry principles as to contingent interests.*

§ 1. A use limited to two jointly when they shall be born, is contingent, and when the first is born, he takes all, and when the second is afterwards born, the estates open and he takes a moiety, as in cases of springing uses. And if A for love and affection covenant to stand seized to the use of B, his son, and such wife as he shall marry, for their lives, B takes all, and when he marries the estate opens and his wife takes half, and the estate vests in them in moieties.

Ld. Bacon on
Uses, 351.

CH. 114. § 2. *Intermediate estates or profits.* As where an estate is limited to A for his life, remainder to B, to commence on the death of C, if A die before C, the profits in the intermediate space between the ending of the first and the vesting of the second estate go to the heir at law of the grantor or devisor, if not otherwise disposed of; and if disposed of, then according to the disposition as to a residuary legatee. 6 Cru. 520.

Art. 25. *Fee*rne, by P. 512.—1 Ves. 268, Hopkins v. Hopkins.—2 Vesey, 521, Bullock v. Stones.

§ 3. And after the profits are vested in a devisee, on his death they may return to the heir till another devisee can take them.

§ 4. A devise of all the rest and residue of the real estate passes all the profits, not otherwise disposed of: as thus, a testator devised to his grandson, W., in fee, and if he died under age, then to his grandson T; and if he died under age then to such grandson of M. P. as might attain to twenty-one years of age, remainder over to Sir R. P. in fee: the testator died, leaving two grandsons, W. and T., who both died under age; afterwards such third grandson was born, to whom the executory devise was held to be good, if he should so attain his age; and that the profits between the death of T. and said third grandson's coming of age vested in Sir R. P. by force of the residuary devise, as an interest in the real estate, not otherwise disposed of. Cited 6 Cruise, 521.

1 P. W. 572.

Fee'rne, 515, Rogers v. Gibson.—6 Cruise, 521.—Fee'rne, 515, Duke of Bridgewater v. Egerton.—2 Ves. 122.

§ 5. "So when the testator devised all the rest and residue of his real and personal estate of what nature or kind soever, to such child or children as his daughter should have, the court held, that the profits from the testator's death to the birth of a child of his daughter should pass under this devise." The same principle holds in personal estate given by executory devise. As where A gave his house with the appurtenances to his wife for her widowhood, then to his eldest son for the time being, who should attain twenty-one years of age; she married in the eldest son's minority; as there was a residuary disposition, as well of the real as of the personal estate, it was held, that the intervening profits between the ending of her estate and the eldest son's coming of age, should pass under this residuary gift,—so much of them as was real would fall into the real residue, and so much as was personal, into the personal residue."

1 D. & E. 631. Doe v. Guartley, cites 5 Co. 8.—13 Co. 57.—Lit. sect. 283.

§ 6. *Joint or not.* If a limitation be to the right heirs of A and B, not husband and wife, or capable of being such, the heirs take as tenants in common; for as the law does not presume that A and B will die at the same instant, their heirs as such, must take at different times, so not as joint-tenants, who must ever take at the same moment.

Co. Lit. 188.—Fee'rne, by P. 193, 324, 335.

§ 7. The principle of remoteness or perpetuity does not hold when tenants in tail can bar the interest; for it is only an

irremoveable perpetuity the law forbids ; when estates are so settled, that they can be disposed of, or new settled for family or other purposes, upon no exigencies or emergencies whatever." In our inquiries then as to remote estates, it is ever material to see if they cannot be barred by some one or more holding an interest in the estates prior to such remote interests.

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Art. 26.

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ART. 26. *How a remainder vested in interest may cease, examined &c.* A remainder once vested in interest, and so grantable, devisable, &c. may in some cases divest as to interest, by destroying the prior freehold. Thus A is seized in fee of certain lands, and by devise, by grant, or by covenant to stand seized to uses &c. makes B tenant for life, remainder to C in fee ; and B enters and becomes tenant of the freehold, not only in interest but in possession also, and so becomes the complete tenant of the freehold in possession :—a tenant the feudal law so much regarded, that it never suffered the freehold estate to be in *abeyance* for a moment, that is, to be without such tenant at any time ; but ever required his existence at all times, to answer not only the feudal services in war &c., but to *præcipes* also, brought against the estate :—the estate made to B for life makes him this tenant for that period ; C has a remainder vested in interest, expectant as to the possession during B's life, vested in interest, because as B has but a life estate in the lands, carved out and made to him, there remains an interest not disposed of to him ; in fact, all the interest but his life estate, and this further interest is conveyed to C, and constitutes his remainder vested in interest ; but by the very terms of the instrument or conveyance, vested not in possession, or to be possessed or enjoyed by him till B's death ; but is expectant or waiting for that event. Now, if B in his life and before his death, destroys his life estate by forfeiture or otherwise, so that it ceases to exist in the condition in which it was created by the will, deed, or covenant, C's remainder depending thereon fails, and ceases also ; for now neither B nor C can be this tenant of the freehold in possession ;—not B, for he has put an end to his estate in the lands by his destruction of it, or essentially altering the estate conveyed or devised to him ; not C, for by the very terms of the devise or deed, he cannot come into possession till B's death ; therefore, on feudal principles, both estates cease, and this tenant is found in the heir at law, or some other, as the case may be. Hence, C's remainder once vested in interest ceases, and falls with the prior freehold whereon it depends, and whereto it was the remainder.

Suppose B by the devise, covenant, or other deed, made tenant in tail, and remainder to C in fee ; here the interest in the land is devised or conveyed to, and vested in tail, or in

CH. 114. part in B, remainder in C, but the possession is solely in B  
 Art. 26. and his issue, so long as their estate continues, or there is issue ;  
 ~~~~~ and that ending it vests in C, and his interest and possession then  
 unite, and he becomes this tenant, whenever the prior estate
 in tail is not destroyed, before C's remainder can vest in pos-
 session, by the terms of its creation : but if so destroyed by a
 common recovery, or otherwise, by tenant in tail, before C's
 remainder can vest in possession, a chasm takes place between
 the two estates, and C's estate in fee ceases to be a remain-
 der to B's estate in tail, for the reasons above stated ; for if
 after B's estate is destroyed, C's estate should be continued,
 and yet not vested in possession, here would be no proper ten-
 ant of the freehold, in this devise or conveyance. Therefore
 comes the general doctrine, that when tenant in tail makes or
 has a proper tenant to the *præcipe* and suffers a common re-
 covery, and thereby destroys his estate tail, or so modifies it
 that it ceases to be what it was made ; all remainders or re-
 versions thereon fall with it, unless they vest in possession,
 the instant that ends ; and before they cannot ; because while
 this life estate or estate in tail continues, the whole posses-
 sion, that not capable of being divided and vested in several
 persons for life, in tail, and fee, is in the tenant for life or in
 tail ;—the remainder here spoken of is not a contingent re-
 mainder, which vests neither in possession nor interest, till some
 specified event happens, as the birth of a person in whom it
 is to vest, or some other event takes place, on which it is to
 arise, and which never arises at all, if the event takes not
 place. On the whole, it is a general principle, that a remainder
 vested in interest must be so constituted as to take effect in
 possession the moment the prior estate, whereto it is a remain-
 der, ends, or it will fall to the ground with it.

As to remainders and reversions, there is a general princi-
 ple in regard to the acts of tenant for life &c. No descent
 cast, nor the statute of limitations, will bar or affect him in re-
 mainder or reversion, during the continuance of the particu-
 lar estates ; nor will the *laches* or acts of the tenant of this par-
 ticular estate affect him in remainder or reversion. A com-
 mon recovery then suffered by tenant in tail destroys the re-
 mainders and reversions thereon, though vested in interest, by
 destroying the estate tail ; because that being destroyed, re-
 mainders and reversions thereon, in their nature, fall to the
 ground, if not vested in possession the moment that ceases ; as
 a remainder or a reversion can no more exist after the prior
 estate is done away, in the nature of things, than there can
 be a remainder of a thing where nothing is taken out of it, or
 more than the whole can be a remainder.

Thus far is taken a brief view of remainders and rever-

sions, and especially of the leading principles on which they are governed, illustrated by a few cases; this is done merely in reference to covenants and conveyances. As the reversions and remainders enter into the titles to estates and make part of them, and involve nice distinctions, they will be considered in Ch. 135, respecting estates in remainder and reversion, where Fearné will be often consulted. And the doctrines of uses and trusts materially affect reversions and remainders.

ART. 27. *Covenants to convey lands.*

§ 1. How viewed in equity. Our covenants to convey lands are frequent, as it often happens parties agree on the conveyance of lands before they are ready to execute the deeds of conveyance, but agree to have the proper deeds of conveyance executed and delivered, on some future event, or on some act to be done, by one party or the other. In such cases it is common for the seller or donor, to enter into a covenant or contract under seal, to make this conveyance when such event shall happen or such act shall be performed: or if only in writing, it is valid.

§ 2. Though in this State we have no courts of chancery to order and enforce a specific performance of covenants to convey; yet the principles of equity in such cases ought to be attended to; for such courts exist in most of the United States, and such are the Federal courts sitting in this State; for by the Constitution of the United States, the judicial power extends "to all cases in law and equity, arising under this constitution, the laws of the United States, and the treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls," to controversies "between citizens of different States," &c. and between citizens and aliens, &c.

It was on this judicial power in equity, the Circuit Court in Boston, in the year 1795, took cognizance of the case of *Vaughan v. Copely*, before stated, and in several other cases. And now in Massachusetts there is such power. See Ch. 108, a. 5, s. 23.

§ 3. In many essential matters of covenants, the courts of law and of equity agree. Neither court can make a contract for the parties. Each must construe their contracts according to their true meaning. And this must be the same in all courts, so as between the contracting parties, neither court will order and enforce a specific performance of a contract in part; that is, if the plt. in equity cannot perform his part, chancery will not compel the deft. specifically to perform on his part.

§ 4. On the same principle, that neither court can make a contract for the parties, even a court of equity will not set aside one, merely because unreasonable, when made without

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This subject pursued, & the late cases, New. on Con. 43 to 62.

If A covenant to convey land with a clear title, it is enough he can do it at the time the conveyance can be legally demanded, 9 Johns. R. 26.—See Ch. 32, a. 13, s. 17.

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2 Pow. on C.
143 to 146.

fraud, and by parties of age, fully acquainted with their respective rights, and the circumstances of the case; for contracts are not to be set aside, because not such as the wisest men would make; but there must be fraud to make solemn, deliberate acts void; but if there be any fraud in the transaction, then unreasonableness in the bargain will be a good ground to act upon. So an unequal hardship imposed on one of the parties in a bargain, viewed as an offence against morality, will be relieved against in equity; or undue influence.

See Ch. 1, a.
7, s. 38.—New
on Con. 43,
62, contracts
to convey. cases
in equity.
—1 Ves. 437.
—2 Vern. 20,
101, 227, 293,
679.—1 Salk.
154.—2 P. W.
170.—3 P. W.
211, 220, 221.
—2 Atk. 453.
—3 Atk. 254,
679, 218.—1
Atk. 573.—1
Eq. Ca. Abr.
217.—1 Bro.
C. C. 377.—
10 Ves. 129.
—8 Ves. 227.
—2 Ves. jun.
170.—Ambl.
210, 229.—
Pow. on C.
57, 58.—10
Mod. 648,
Peach v. Win-
chelsea.—1
P. W. 277,
Finch v.
Same.

§ 5. But in some things the common law and chancery very materially differ in regard to covenants or contracts to convey estates. If broken, the common law, not a little defective in this respect, can recompense the party injured only in damages for the breach of them; but in chancery it has long been a principle to compel the parties "to carry into execution the specific thing agreed for, if that can possibly be obtained." The common law views executory agreements, but as personal security, and thence the party injured, by the breach of them, as entitled only to damages to be recovered in an action of covenant if there be a deed, or if no deed by an action of *assumpsit*. Therefore if one covenant to convey his lands to me, his contract or covenant is executory, until he actually conveys them to me; the lands remain his at law, and at law I have only security for damages, for his not conveying. But in chancery the covenants or stipulations of the parties themselves are strictly regarded and enforced; and it is not deemed reasonable that a man who covenants or contracts to convey lands, should have an election to do it, or to pay damages, as seems to be the idea at common law. In equity it is a settled principle, that when one, for a valuable consideration, contracts or covenants to do a thing, to consider it as done; that where one covenants to convey an estate, it is parted with in equity from the time it should have been conveyed, and thenceforth the vendor is as a trustee to the vendee. And therefore if the owner of land covenant to convey it to me, one becoming his bond creditor afterwards, will have no lien upon it; for from the date of the covenant to convey, the land is mine in equity; the same rule holds as to a judgment in England entered after the covenant or contract to convey is made; but in these cases the consideration paid must be adequate to the thing purchased, and not a small proportion of its value.

§ 6. But a mortgagee without notice after such contract or covenant, is not bound by it; for if the contractor be trustee, the mortgagee is as a fair purchaser, without notice of the trust, and for a valuable consideration; as he has no cause to suspect, he has no occasion to inquire about such executory

contracts, as that to convey not recorded, and when the contractor remains in possession. The mortgage also is a specific lien on the land, whereas a judgment is but a general security.

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§ 7. On these principles, the estate contracted for is transferred from the time of the contract made, and the vendee is liable to all contingencies after that time and before the actual conveyance. As where a house in Jamaica was so contracted for, and between the date of the contract and the conveyance, was destroyed by an earthquake, chancery ordered a specific performance notwithstanding. The court of chancery seems to proceed on the ground the right of property is changed by the bargain to sell, though the possession and the enjoyment of it by the vendee is postponed till a formal conveyance is made, but otherwise if there be any fault in the seller in actually conveying, or in making title, or any way on his part.

2 Vern. 280,
Cass v. Rut-
dele.—2Pow.
on C. 63, 76.
—Reeves' His.
of the Com.
Law, 373.—1
P. W. 61,
White v. Nutt,
—2 P. W.
217, Stent v.
Bailis.

§ 8. If the price be inadequate, yet not so much as to afford evidence of fraud, chancery will, on this account, lay hold of any other, even not very material circumstance, not to decree a specific performance, and if such performance is not to be decreed, the estate must, of course, remain at the risk of the seller. So if the transaction be not a contract of sale, but merely an agreement to make such a contract at a future day, the seller remains owner and risks the estate. Now this circumstance of risk is material in our law, as well as that of England; for whether a specific performance can be decreed or not, and the estate suffers an accidental injury or loss, it is material in either law, to consider at whose risk the estate was, even in an action for damages for not conveying. See *Pope v. Roots*, questioned, *New. on Con.* 82, 85; and *Jackson v. Lever*, 1 *Bro. C. C.* 605; 1 *Yeates*, 312.

7 *Brown's*
Par. Cases,
148, *Pope v.*
Roots, 184.—
2 *Pow. on C.*
76, 79.—1 *P.*
W. 277, *Carter*
v. Carter.
New. on Con.
84.—*Bro. C.*
C. 156, *Mortimer*
v. Cap-
per.

§ 9. On the same principle, that what is contracted to be done is viewed in equity as done, money agreed to be laid out in lands is viewed as lands, and land agreed to be turned into money is viewed as money, whenever chancery will decree a specific performance.

2 *Pow. on C.*
83 to 146.—
New. on C.
43, 47.

§ 10. It is another rule in chancery, that if any question of fact arise on a bill for a specific performance of contracts, or covenants to convey, to send the question to be tried by a jury, before the court will decree as to the principal question.

4 *Brown's*
Par. Cases,
567.

§ 11. Another rule is, that if an unreasonable advantage be made of a necessitous man, equity will set aside the contract, though there be no fraud or surprise, and though the contract be, strictly speaking, lawful.

Bosanquet v.
Dashwood,
Talbot, 38.

§ 12. Entry *sur disseizin* to recover lands the demandant

8 *Mass. R.*
431, *Storer v.*
Batson; French testified he had no interest in these lands.

CH. 114. levied upon as David Jones'. May 1798, one Williams seized
 Art. 28. in fee, in pursuance of a verbal agreement with Jones, by
 deed conveyed said lands to George French in fee. Jones
 paid the consideration. And French, the same day, contract-
 ed to convey the lands to any person Jones should appoint.
 Held, no estate vested in Jones. French acted for Jones,
 who was an alien.

ART. 28. *Merger.*

See Ch. 135,
 a. 2, s. 14, 15,
 16.—2 Bl.
 Com. 177;
 but a term in
 trust does not
 merge in
 equity as at
 law.—Ambl.
 245, 600, 753.
 2 Ves. jr. 261,
 264.—2 P. W.
 236, 601.—
 Freem. 207,
 288.—1 Salk.
 154.—2 Wils.
 329.—9 Ves.
 jr. 609.—1 D.
 & E. 441.—6
 East, 86.—1
 Cruise, 263.

§ 1. The general principle is, that a less prior estate merg-
 es or drowns in a larger subsequent one, when they meet in
 the same person, not by the same conveyance, and there is
 no intermediate estate. The principles of merger, as Sugden
 observes, are clearly involved in our conveyances and our cov-
 enants respecting lands; for as these covenants often adhere
 to, and run with, estates in lands, they may continue in force
 where there is no *merger* of the estates whereto annexed, and
 they may cease and vanish where such estates merge and so
 vanish, or the estates whereto annexed, and wherewith they run,
 have other estates merged and drowned in them; for in the
 first case, the estate to which the covenant is annexed, is van-
 ished and gone, and so the covenant with it; and in the sec-
 ond case, the estate to which the covenant is adhering is mat-
 terially altered by another estate being merged in it, so is no
 longer the same estate to which the covenant attached, and
 he that holds this new and enlarged estate cannot claim a cov-
 enant attached to, and made to run with, the old and different
 estate. So as to conveyances.

2 Bl. Com.
 177.—Wat-
 kins, 113.

§ 2. But though an estate tail be less than a fee, it will not
 merge; because it was the object of the statute *de donis* to
 preserve the estate to the issue.

Co. Lit. 54.—
 1 Cruise, 263,
 265.—1 Co.
 L. 338.

§ 3. If there be a lease for life, remainder for years, in the
 same person, there is no merger, for a larger prior estate does
 not drown in a less subsequent one. But if there be a lease
 for years, remainder for life, in the same person in the same
 right, the former merges in the latter, upon the general prin-
 ciple above stated.

2 Bl. Com.
 186.—2 Co.
 60, 61, Wis-
 cot's case.

§ 4. But estates created by the same conveyance are one
 estate, and do not drown or merge: therefore if a man give
 an estate to A, B, and C, for life, and to A's heirs, whereby
 he has a fee, still the jointure for life continues; for all is but
 one entire estate, created at one and the same time; thence
 the fee simple cannot merge the jointure which took effect with
 the creation of the remainder in fee. Nor does an executory
 interest by devise merge, or a vested interest to defeat it.
 But otherwise if an estate be made to A, B, and C, and A
 afterwards purchases the fee; as where they are tenants for
 life, and afterwards A buys the fee, or it descends to him,

Fearne, 55.
 —Form of a
 plea of merg-
 er, 5 Wentw.
 43 to 53.

there his life estate merges in the fee simple, and a covenant annexed to his life estate is necessarily at an end. So where A is tenant for life, and the reversion is granted to him and B, a moiety of A's life estate merges in his moiety of the reversion, for the tenant for life cannot get the reversion or remainder of the same land, but the estate for life will be merged, having regard to the estate which he has got in the reversion. But a term for years cannot merge in a term for years, meeting in the same person. But 1 Cruise, 266, contra, and cases.

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Art. 28.

Co. Lit. 273.

§ 5. *So estates in different rights may merge.* As if A be lessee for years, in his own right, and take a wife seized of the freehold, his term is merged. And estates, after possibility of issue extinct, will merge. So a trust estate will merge in a legal one. So an equitable in a legal estate; but not *e converso*. But see 1 Cruise, 264; & Sugden, 304.

Co. Lit. 338.
—Watkins,
114, 171, 191.

§ 6. "If the legal estate in the land descend in fee simple on the part of the mother, and the equitable interest on the part of the father, (or *vice versa*,) the paternal estate shall merge in the legal estate, and both follow the line through which the legal estate descends." Merger by surrender, 1 Cruise, 265.

2 Bl. Com. 38,
Chris. notes.
—9 East, 372.
—Doug. 771,
Wells' case.

§ 7. So where A and B are tenants for life, and the reversion descends on, or is granted to B, his moiety for life merges in the reversion, and works a severance of the joint-estate.

2 And. 202.
—2 Co. 60,
case of Wis-
cot.—Cro. El.
570.

§ 8. But if an estate be made to A for life, and for the lives of B and C, his estate for their lives does not merge, for he has but one estate, that is, for three lives, and of the survivor. Where a term for years merges in the freehold or not, or one term for years in another.

1 Cruise, 265.
—5 Co. 13,
case of Ross.
—1 Cruise,
263.

§ 9. *Where covenants cease by mergers.* As if A have a reversion of a term in him, and rent and covenants attached thereto, and he buys in the reversion in fee, and so holds both in the same right, the term merges in the fee, and the rents and the covenants fall to the ground, and of course because the estate is annihilated to which these covenants were annexed, and with which they were made to run. Hetley, 36; 3 Leo. 112; 1 Ld. Raym. 520.

3 D. & E. 393,
Webb v. Rus-
sell.—Salk.
326.

§ 10. But if a tenant by the curtesy about to purchase the inheritance, convey his estate by the curtesy to A and B in trust for eighty years, if he live so long, this prevents a merger of the life estate, and the said term is to attend and wait the freehold and inheritance. Where a term for years does not merge, Cruise on Uses, 63.

5 Wood's
Con. 158.

Saving 3 sect.
of the act.

§ 11. If A be lessee for life, reversion to B in fee, and A grant his life estate to B and C; B's life estate in a moiety is merged. So if tenant for life or years, surrender to him who has the immediate remainder or reversion of a greater

Co. Lit. 184.

2 Bl. Com.
326.

CH. 114. estate, the estate of the surrenderor is drowned ; and so any
 Art. 27. covenants annexed to it are gone by the merger.

§ 12. So if tenant for life surrender to the use of him in remainder, the life estate is merged in the fee ; and all covenants annexed to this lesser estate, and which but for the merger would have run with it, are annihilated.

When a merger destroys a contingent estate.

If A be tenant for life, remainder to her first and other sons in tail male, successively, and marries, and before any son is born the reversioner in fee grants his reversion to her and her husband, by fine, and then she has a son and dies, the contingent remainder to the son is destroyed ; for the husband and wife take by *entireties*, and her life estate merged in the reversion granted by the fine to her and her husband, before a son was born, and so before the contingency happened on which the contingent remainder was to vest : her possibility to set the fine aside makes no difference ; “ for when the contingent remainder cannot take effect when the particular estate determines, be it by surrender, merger, or feoffment, or otherwise, it can never afterwards arise.”

4 Bac. Abr.
329.

§ 13. Wherever a leasehold, or life estate, merges, or is drowned, it can no longer be an obstruction, and rents &c. out of the remainder become due and payable sooner than they would if there were no such merger.

2 Fearn, 55;
 Hammington
 v. Rudyard.
 —10 Co. 52.

§ 14. W was possessed of a house for a term of years, and devised the profits of it to J, during the time she should continue sole, and then he devised the term to R, and died. J entered by the executor's assent, and afterwards she purchased the fee ; and the court decided, that though the whole term was in her *quousque* &c., so that by the purchase of the fee simple her interest became extinct, yet the same did not defeat the executory devise to R, but that after her marriage, and not before, he might enter. Nor can R's interest be affected by the forfeiture, feoffment, or other act of J ; for if it could be, the executory interest might easily be annihilated, without any prejudice to her interest, by collusion betwixt her and the reversioner ; from whence it seems to follow, if there were a covenant of quiet enjoyment originally annexed to this term for years in the creation of it, and running with it, R, when he comes into possession, shall have the benefit of it.

2 Fearn, 55.

Co. Lit. 338.
 Saunders v.
 Rounsford.—
 Equity will
 relieve
 against
 mergers, 1
 Cruise, 226.

§ 15. “ If the lessee for years of a college be made head of it, this drowns not the lease for years, because the freehold vests not in him, but in the corporation.” Nor does the wife's lease for years merge in her husband's freehold or inheritance ; hence any covenant annexed to her term continues, and if broken an action of covenant lies. And so a covenant real annexed to an estate in lands, may exist as a per-

sonal contract, in some cases, after the estate is merged and gone. It does not seem to be fully settled, that if one have a term in one right as executor &c., a fee in another, as in his own, the term will merge; or the husband's term in his wife's fee. See the cases, Sugden, 303, 304, 305. CH. 114.
Art. 29.

ART. 29. § 1. By remitter one estate ceases and another revives, or a man is remitted from one estate to another by operation of law, and therefore any covenant real, annexed to the estate which ceases to exist in this operation of remitter, falls and vanishes with this estate. As where A, tenant in tail general, makes a feoffment in fee, and takes back a fee simple, and then marries and has issue by his wife, and dies, his heir is remitted to his estate tail, and the fee vanishes; and A's wife cannot have dower, as the fee is gone; but in bar of her dower the heir must plead the special matter. Had any covenants been annexed to this fee simple estate of a nature to adhere to it and run with it, they would have vanished with it by this remitter. Hence, to consider the principles of covenants and conveyances extensively, and in all their essential branches, they must be examined in mergers, remitters, discontinuances. And as estates are affected or annihilated by remitter, they cease to be subjects of conveyance. Just. Inst. 31.

§ 2. This was a grant and a conveyance of a grist-mill in West Springfield, with the appurtenances thereon; held, the soil of a way to it from the highway, used time out of mind, did not pass, but a right of passage in the way did. Things appendant are by prescription &c., see Ch. 76, a. 8, appurtenant not so. 7 Maas. R. 6,
Leonard v.
White.

Remitter is in the place of a recovery by suit, as the law remits the party to that estate in the lauds, which estate it is his right to have or recover.

§ 3. *Remitter, what.* A remitter is when one has an old remediable right in lands, and has the possession of them cast upon him by operation of law, as the heir by descent, or the wife by her husband's act. And the reason of remitter is, because without it one often would not be in the lands by his true or better title. As where tenant in tail in feoff A, and takes back an estate in tail, and dies, whereby his issue or heir comes into the land under this later title from A, and this is the heir's weaker title, and being in the land he cannot assert and establish by a suit his old and better title, as he cannot sue himself; now the law observing this, and that he may be in the lands of his old and better title, the law remits him to it, and judges him to be in the lands in the same plight as if in a suit, he had recovered them from another. He enters by virtue of his subsequent defective title, and the law remits him to his more certain right, and this because he comes to Co. L. 31.

OH. 114. the land and possession by act of law, and not by his own act.
 Art. 29. And the possession and estate being thus cast upon him, with-

8 Bl. Com.
 19, 20, 190.

out any purchase or act of his own, he cannot bring an action to recover the estate on his better title, without the absurdity of suing himself; hence the law unites his possession to his more ancient and certain right or title.

3 Bl. Com.
 20, 21.

§ 4. *Things essential to a remitter*: 1. An ancient right: 2. A new defeasible estate of freehold uniting in the same person: 3. This new defeasible estate must be cast upon the tenant, and not gained by his own act or folly. And the effect of remitter is to place the party in the situation he would have been in, had he lawfully recovered the land by suit on his better title; therefore, where one can have no remedy by action, or has no remediable right, there can be no remitter. As if the issue or heir in tail be barred by the covenant of warranty of his ancestor, or by his fine, and the freehold is cast upon the heir afterwards, he shall not be remitted to his estate tail, as he is barred of it by such covenant or fine.

Co. L. 347,
 348.

§ 5. So where there is an action without right, or a right without an action, there is no remitter; and "the law prefers a sure right, though but to a small estate, to a great defeasible estate." And there can "be no remitter to bare title of entry, nor can there be any remitter but by the descent of an estate. Therefore, if an ancient bare right descend to one who has a later right, yet he is not remitted," as on such rights he has no remedy by action. As to what a remitter is. There is none to a thing appendant or appurtenant, until the principal thing be recontinued; and remitter to the principal is to the appendant, for he can have no action to recover the thing appendant. "If tenant in special tail have issue a daughter, and his wife die, and he marries again, and has issue another daughter, discontinues, and takes back an estate in fee and dies, and the land descends to his two daughters, there is a remitter to no more than a moiety, and the issue in tail and the other become tenants in common." Here the second daughter having only the defeasible title in fee could not be remitted, though the other was to her better title in tail.

Co. L. 349,
 350.

Co. L. 351.

§ 6. So if tenant in tail infeof his heir apparent of full age, and die, his heir shall not be remitted to his title in tail, as it was his own folly to take such a feoffment.

Co. L. 351.

§ 7. If tenant in tail enfeof a woman, and the minor issue marry her, he is remitted, by his freehold in her right which he gains by the intermarriage; otherwise, if not a minor.

Co. L. 364.

§ 8. "If two joint-tenants, A of age, and B not, be disseized by C, and C dies seized of the lands (B being yet a minor) and C's heir lets the land for life to A and B, both then being of full age, this is a remitter to B whose entry was lawful, but

not to A ;" for B being a minor when the descent was cast upon C's heir, lost not his right of entry. CH. 114.
Art. 29.

§ 9. "If tenant in tail enfeof his issue, and the issue grant a rent out of the land, and then the right of the tail descend upon him, he shall hold the land discharged ;" for he is remitted to his title in tail, above the grant of rent, and the estate he had when he made this grant is utterly defeated. But annuity lies against him on his contract or covenant : and so if he had leased for years when holding under the feoffment, and covenanted for the quit enjoyment of the lessee, he had been held on his lease and covenant, for, though by the remitter his estate under the feoffment is extinct under which he made them, yet he is held by his contract.

§ 10. If the heir of the disseizee disseize the disseizor and grant a rent, and then the disseizee die, his heir is remitted, and the rent is gone so far that he holds the lands by remitter to his ancestor's title discharged of it, and a new right of entry descends to his heir, and his estate by disseizin is vanished, out of which he granted the rent, yet his covenant the grantee should have the rent will hold as a contract. So that remitter may extinguish the defeasible title under which one grants and covenants, and yet avoid not the covenant. Co. L. 349.—
Lit. sect. 693.

"The father disseizes the grandfather, grants a rent and dies, then the grandfather dies, the son is remitted," and the land is discharged of the rent. The father by his disseizin acquired an estate, which descended on his death to the son, so a descent being cast the grandfather had no right of entry, the land then passed from him to the son, the grandfather's heir at his death, a mere right of action. Co. L. 349.—
Lit. sect. 693.

§ 11. But a wife may be remitted, though not properly coming to the land by descent, as appears in the following cases.

§ 12. A woman seized of land in fee marries B, and he aliens it to C in fee, he lets it to them for their lives, by deed indented, she is remitted presently. Baron &
Feme, 202.

§ 13. Tenant in tail discontinues in tail, and has issue, a daughter, and dies, she being of age marries B, and the discontinuee makes a release to them for their lives, she is remitted and is in by force of the tail. Lit. sect. 671.

§ 14. The husband discontinues his wife's land, and takes back an estate to him and her, and to a third person, for their lives or in fee, she is remitted for a moiety only, and must sue her *cui in vita* for the other moiety. 1 Inst. 366,
Baron &
Feme, 203.

§ 15. Land is given to *baron* and *feme* in special tail, he aliens it in fee, and takes back an estate to him and her for their lives, he and she are both remitted ; for they are one person in law, and it cannot be a remitter to the wife, unless it be a

CH. 114. remitter to the *baron* also ; yet he gets into the estate by his
 Art. 30. own act.

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 Lit. sect. 680. § 16. But if the husband discontinue the wife's tenements, and takes back an estate to himself for life, the remainder to her for life, she is not remitted till after his death ; as during his life she has nothing in the land and does not come to any estate in it.

Baron & Feme. Townsend's case. § 17. The husband discontinues his wife's land in fee to his and her use for life, with remainder over, and dies. She enters, but is not remitted, though the possession was transferred to her use by the statute of uses ; for the statute says, he shall have the possession in such manner as he had the use ; and as the use makes no remitter, so neither the possession transferred to it.

Dyer, 171. Baron levied a fine of his wife's land and died, she accepted a lease for years of it. Held, she was remitted.

1 Inst. 357. § 18. In some cases the wife may elect. As where lands are given to *baron* and *feme* and their heirs, and he makes a feoffment in fee, the feoffee gives the land to *baron* and *feme* and the heirs of their two bodies, the *baron* dies, she may elect either of the two estates ; that is, she may consider herself as remitted to either, and she could not be remitted till the possession and right met in her.

2 Saund. 386. § 19. If the wife be tenant for life, and she and her husband accept of a greater estate of him in reversion, yet after her husband's death she may waive it, and claim her first estate for life.

Doct. & Stud. 32. § 20. If land descend to one who has right to it before the descent, he shall be remitted to his better title if he chooses.

Co. L. 31. § 21. If tenant in tail make a feoffment and take back an estate in tail, and die, the issue is remitted.

Co. L. 50.—  
 8 Bl. Com.  
 19, 20, 190. § 22. If the disseizor enfeoff the disseizee and others, the disseizee is remitted. And where one has the mere right of property, he cannot sue when the law has cast the possession on him, and when thus in possession, he can be in of his better title but by remitter, hence the law remits him.

Co. L. 226. § 23. If tenant in tail make a feoffment on condition, re-enter, and die, his issue is remitted, and is in above the condition.

Co. L. 348. § 24. "There can be no remitter to bare titles of entry, nor can there be any remitter but by the descent of an estate." "Therefore, if an ancient bare right descend to one who has a later right, yet he is not remitted ;" the old right must be remediable or the law will not remit him to it. It follows, if one elect to be in by remitter, he cannot claim covenants annexed to the estate he thereby renounces.

ART. 30. *Discontinuance of estates.* § 1. This branch of

the law is somewhat connected with conveyances and covenants as to lands, especially warranties, as will appear below.

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Art. 30.

§ 2. *Discontinuance of estates, what.* It is when he who has an estate tail makes a larger estate of the land, than by law he is entitled to do. In which case the estate is good, so far as his power extends who made it, but no farther. As if a tenant in tail make a feoffment in fee, or in tail, or for the life of the feoffee, his entry is lawful for the life of the tenant in tail. But if the lessee or grantee remain in possession, after the death of the tenant in tail, it is a wrong and a discontinuance. The old legal estate which should have gone to the heir being for a while gone, suspended, or discontinued. And whenever the estate that causes the discontinuance ceases, that also ceases.

3 Bl. Com.  
171.—1 H.  
Bl. 269.—  
2 Cruise, 327,  
5 Cruise, 120,  
233.

§ 3. A discontinuance of an estate in lands, properly signifies an alienation by tenant in tail, or by one seized in another's right. It may be in five ways: 1. By fine: 2. Recovery: 3. By feoffment with or without warranty: 4. By release with warranty: 5. By confirmation with warranty, whereby in either case, the heir in tail, successor, or wife, is driven to an action and cannot enter. Ch. 108, a. 5, s. 18, Soule's case.

Co. L. 325,  
336.—8 Co.  
71.—4 Maule  
& Sel. R. 178.  
—4 Cruise,  
110.

§ 4. The husband could discontinue his wife's estate before 32 H. VIII. 28, but not since that act was passed, if seized of her estate, or jointly with her of any freehold or inheritance by feoffment or by recovery without voucher. The husband cannot discontinue lands in special tail. The father, in Borough English, releases with warranty having two sons,—no discontinuance.

3 Salk. 131.—  
Co. L. 326.—  
Co. L. 328.

§ 5. Of what things there may be a discontinuance. "Of things lying in grant there can be no discontinuance. Therefore, if a tenant in tail of a rent, advowson, common, or remainder or reversion expectant on a freehold, make a grant by deed or fine, there is no discontinuance." If tenant in tail grant a rent or remainder with warranty, and the issue bring a *formedon*, and admit himself out of possession, he shall be barred by the warranty and assets."

Co. L. 332.—  
5 Cruise, 236.  
—4 Cruise,  
113.

§ 6. Exchanges do not work a discontinuance, because they do not require livery of seizin, and pass no more estate than the party has.

Co. L. 332.

§ 7. There can be no discontinuance where the grantor conveys no greater estate than he himself has, for then he displaces or turns to a right no other's estate. Hence, if tenant in tail bargain and sell to A and his heirs in England, it works no discontinuance, for he conveys only the use of what he owns, and the statute vests the estate and possession as the bargainee has the use, and he has this in no larger manner

Farr. R. 2.—  
4 Cruise, 184,  
194.—Gilb.  
Uses, 297.

CH. 114. than the grantor could grant it lawfully. In fact, there is no  
 Art. 30. discontinuance of an estate but by solemn act of livery of seisin, or by fine, or some mode of conveyance having the effect of livery of seisin,—and on actual seisin. 1 H. Bl. 269 ; Co. L. 339.

§ 8. None can discontinue estate tail &c., unless he were once seized by force of the tail &c., unless it be in “respect of a warranty, which being made to a feoffee or disseizor and descending to the heir, had the effect of a discontinuance in taking away the entry of the heir before 4 & 5 of Anne, ch. 16.” For if never seized in tail, he could convey only his own interest in the lands ; and the warranty descending on the heir and barring his entry works the discontinuance of his estate rather by *estoppel*.

Co. L. 327, § 9. One by release or confirmation can pass no more  
 328.— than he can lawfully pass ; therefore, if a tenant in tail make  
 4 Cruise, 202. a release or confirmation to a disseizor without warranty, there is no discontinuance, but with warranty there is, if the warranty descend on him who has right, and not if the warranty descend on one who has no right to the entailed lands. In the last case the covenant of warranty works a discontinuance by rebutter.

Co. L. 329.— § 10. “The release of a husband, seized in his wife’s right,  
 Dyer, 356.— to a disseizor with warranty, never was a discontinuance to  
 None by a the wife, unless she were his heir ;” for the release passes  
 covenant to only his estate, and his covenant of warranty does not bar,  
 stand seized. rebut, or affect her estate in the lands where she is not his  
 4 Cruise, 194. heir. “So if tenant in tail release in fee to his lessee for  
 —Co. L. 331. years, or confirm his estate in fee, yet does he not discontinue the entail, for no more passes by the release or confirmation than lawfully may.” The discontinuee is a *deforciant*, and is so called in *formedon*.

Co. L. 326, § 11. If the husband alien the wife’s estate, the 32 H. VIII.  
 28, does not give the heir an entry during his life on his alienee, the husband “having issue by his wife, which would have given him a title to have been tenant by the curtesy, if he had not aliened.”

Co. L. 326, § 12. “But any tenant in tail once seized of the freehold  
 339, 347. and inheritance by force of the tail may still, by feoffment, discontinue his own estate and the reversion and remainder depending on it, in respect of the privy of tenant in tail and the issue, and those in remainder and reversion, and because an entry would defeat the warranty intended to be annexed to the feoffment. And after Westm. 2, which restrained tenant in tail from claiming, he was construed to have such power as the law gave to those seized in fee in *auter droit*, whose feoffments were voidable by action only.”

"None can make the discontinuance larger than the alienation by tenant in tail made it. Therefore, if A, tenant in tail, make a gift in tail to B, and B enfeoff C, and die without issue, A's issue may enter." And "he that claims by title paramount above the discontinuance, may enter." CH. 114.  
Art. 31.  
Co. L. 327.

§ 13. "Where no greater estate passes than for life of tenant in tail, as in grants of reversions &c., a warranty added, whether by tenant in tail or any other ancestor, never causes any discontinuance." In this case the warranty must be construed to be confined to the life estate granted by tenant in tail, and not to bind any other estate. Co. L. 339.

§ 14. Before 32 H. VIII. 38, if one was seized of lands in his wife's right, in fee, in tail, or for life, and thereof enfeoffed another, and died, the wife could not enter, but was driven to her action; otherwise since the act. Baron & Feme, 196.—  
Bac. Abr.  
Am. ed. 837,  
838.

§ 15. A minor husband makes a feoffment in fee of his wife's lands, and dies, she may enter and may take benefit of his minority; for the husband's heir cannot enter, for no right or title descends to him. And if the heir enter for condition broken, he defeats the discontinuance, and the estate made thereby vanishes, and the wife's estate vests without entry or claim. Baron & Feme, 197.

§ 16. In Massachusetts there never has been much occasion to attend to these branches of the law as to *merger*, *remitter*, or *discontinuance*. We have had but a few estates tail; wives have generally joined in their husband's deeds, &c. &c. No case *eo nomine* is recollected to have arisen in practice. Cro. Car. 406.

ART. 31. *Summary view of executory estates, on select authorities.*

§ 1. In creating these estates as well as others, the intention of him who conveys is always to be attended to, but this intention must be governed by the rules of law in four cases: As 1. No intention can prevail to create perpetuities: Nor 2. To put a freehold in abeyance: Nor 3. To limit chattel interests as inheritances: Nor 4. To limit a fee upon a fee.

§ 2. As to a term or personal estate, when there is carved out of either a life estate, which in law takes the whole, and leaves but a possibility, as in Manning's case, 8 Co. 187, all interests after this life estate must necessarily be executory; to arise and vest on some event to happen within a legal time, that is, of a life or lives in being, time of pregnancy and twenty-one years after. And it is the same thing to devise the term for life, remainder over, or to devise the land, or the lease, or farm, or use, or occupation, or profits of the land. Lampet's case, 10 Co. 46. Lampet's case, Fearne, 28, 29.

§ 3. *As to freeholds and fees.* Where a fee simple is conveyed to one, there is no estate remaining; but if this fee be devised, so as to cease on some contingent event happening

CH. 114. within this legal time, then there may be estates after it ; but  
 Art. 31. as only possible or contingent, they must, in their nature, be executory, or all to be executed.



§ 4. As to estates tail. When an estate tail is created, vested, or not, something remains in remainder or reversion, capable of vesting in interest, though not in possession ; and of being devised or granted, during such estate tail. In the application of this general principle, these distinctions may be made : 1. When this *residuum* is given or devised to one capable of taking next after a vested estate tail, as in *Southby v. Stonehouse*, it is a vested remainder : 2. Whenever this *residuum* is preceded by a *vested freehold*, or *estate tail*, as in *Spaulding v. Spaulding*, it is, when given or devised in the same will or conveyance, a remainder depending thereon ; and when to one incapable of taking, as to one unborn, or to the heir of one living &c., or to one on a contingency, as in that case, it is a contingent remainder, and not an executory devise : 3. It is an executory devise when no such freehold or estate vested precedes. This incapacity or contingent event makes the interest contingent or executory ; and this is a remainder, whenever it has a prior freehold, created by the same instrument, and vested, to rest upon, and whenever it is not the same instrument, is an executory devise, made to wait the legal time.

§ 5. As to mere freeholds. When a freehold is created, vested or not, something remains in reversion or remainder capable, as in the case of the estate tail ; and this *residuum* has all the legal properties that *residuum* has above named. It follows there can be no executory devises in cases of estates in fee, in tail, or of freehold only, where the will or deed, which creates them, creates no vested freehold, or estate tail, capable of supporting them ; but when such will or conveyance creates only terms of years, and executory interests, or fees simple, conditional, none of which can support a contingent remainder, if the executory interest be preserved at all, it must be by way of executory devise. But when the vested freehold, or estate tail, does not exist, by the same instrument or conveyance, which creates or gives this executory estate, the former does not support the latter as a contingent remainder ; for estates created by distinct instruments cannot be tacked together, as by the cases of *Moor v. Parker*, and *Habergham v. Vincent*, then this executory interest must be, if at all, by executory devise in such a case.

§ 6. This vested freehold, or estate tail, must not only be created by the same will or conveyance as the executory interest, to make it a remainder ; but this vested estate must be annexed or joined to this executory estate, at least in possibility ; for if they be positively and at all events, separated by

any intermediate time, by descent, or another conveyance, they are not annexed; the latter is not a remainder, *quoad* the former; nor does one support the other; or the estate executory depend on the estate vested. As where an estate is given to A for life, and after its expiration, and one day after, then to B for life, B's estate cannot be a remainder to A's, though A's estate in itself is a vested freehold, and capable of supporting a contingent remainder. But in this case, as it expires before B's estate commences, and there is a chasm between them, yet B's estate may be good by way of executory devise. In this case, an inheritance descending to the heir, or a term passing to the executor, is like an interest created by another conveyance;—no part of the limitation, because not limited by the same instrument.

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§ 7. Any number of these executory estates may be created by the same instrument or conveyance, if all are created to take effect and vest or be destroyed, or in a situation to be destroyed, in legal time. Now if one be executory, all the after ones must be so. There can be no question as to fee on a fee, or a personal estate, for the reasons above; the question, if any, can only be made as to a freehold to commence *in futuro*, without any preceding one to support. For the first executory limitation being the first freehold created or limited by the devise, no freehold, under it, can vest in possession till the time appointed for the first to take effect; for if an after one, according to the order in the will, could take effect, and vest before such time, then there would be a freehold vested, limited, by the same will, then the first executory interest in the said order would, before the time appointed for its vesting, become a contingent remainder; for it would be an executory interest annexed to a vested freehold; and if an after one can vest in possession, before a prior one can arise, it is gone forever; for the after interest being so vested cannot open to let it in, when otherwise it might arise and take effect; nor can such estates change place; all must be executory till the time comes for the first to vest or fail, then all subsequent ones to persons in *esse*, and capable of taking, must vest, unless some impediment, before mentioned, intervenes, as in *Gore v. Gore*, &c.

§ 8. *The prior executory estate not a condition precedent to after ones.* If the prior estate do not arise, but fail, the remainder over will arise: as a devise to B's sons, on a condition which fails, an after devise to C's sons, takes effect, as in *Jones v. Westcombe*, *Gulliver v. Wicket*, *Hopkins v. Hopkins*, *Doe v. Fonnereau*, and *Abdyn v. Ward*.

§ 9. "Whatever number of limitations there may be after the first executory devise of the whole interest, any one of

CH. 114. them, which is so limited, that it may take effect (if at all,) within twenty-one years" after a life in being, may be good in event, "if no one of the preceding executory limitations, which would carry the whole interest, happens to vest." But when once any such limitation, carrying the whole interest, vests, that moment all the subsequent limitations become void, and the whole interest is then become vested. 2 Fearn, 406 to 410, also *Brownsword v. Edwards*.

§ 10. *A fee conditional, or fee tail, as the contingency happens.* A devised to B, (his son and heir,) and if he died before twenty-one, and without issue of his body then living, the remainder to D. B survived twenty-one, and held, he had a fee simple immediately; that his estate tail was to arise on a contingency that never happened. This must mean, if he had had and left issue, he would have had an estate tail by implication, the first devise being to him indefinitely. 2 Fearn, 390, cites *Collinson v. Wright*, Sid. 148.

§ 11. *A fee simple conditional.* As an estate given on condition, or determinable on a certain event's happening; if the event happens, it ends; if not, it remains and goes to all the heirs, according to the gift; for a fee simple only being created, that only must remain, if the event, which is named to put an end to it, happens not. And the common expression, *if the grantee in fee simple die before a certain time named, not leaving issue*, is merely a description of the event, or contingency, and if he die leaving issue before or after such time, he has a fee simple, as he would have dying after without issue, and no estate tail, for no estate tail is given; and see *Pells v. Brown*. But if a grantor devise to one in tail, as to him and his issue, or to him and the heirs of his body, instead of a fee simple, then such words are used, if he die before such a time, and leave no issue, the estate to end, and he dies leaving issue, he may have an estate tail, for only an estate tail is created. The reason of the difference between the words, *dying without issue*, and *dying without issue in the life time of A*, or other limited time, is thus: If an estate be given to B and his heirs, or in fee simple, and it is added in the same instrument, and if he die without issue, then to C; B has a fee tail, because it is clear, on the whole, that C is to have it, when B's issue shall fail, but not before. And it is absolutely essential to an estate tail that it continue in the issue specified, whether male or female, of this or that wife &c., so long as there is any of that specified issue; and its natural extension is the natural termination of the estate tail. But when it is, a dying without issue in the life time of A, that terminates the estate. It is a mere contingent event, which may or may not happen, in a certain time; as the death of one, in the life of

another; may or may not happen, a mere event that has no natural relation to the ending of the estate. *Spaulding v. Spaulding*, above; *Cro. Jam.* 695, *Chadock v. Cowley*; 5 *Bac. Abr.* 376; *Richardson on Wills*, 62, 74; 6 *D. & E.* 307, *Dainty v. Dainty*; 1 *Wils.* 105, *Gulliver v. Wickett*; 2 *Com. D.* 381. Where the devise is to A and his heirs, and if he die without issue, then over to B and his heirs; the words, *his heirs*, mean heirs of his body, as after explained; not that he has first a fee, and then that, by the after words, turned into a fee tail. As a devise to A and his heirs, another to B and his heirs, and survivor to be heir to the other; if either die without issue, each takes a fee tail, and not a fee determinable on their deaths, because such dying without issue is not confined to any time, and the words, *without issue*, explain the word *heirs*. *Cro. Jam.* 695, *Chadock v. Cowley*; *Cro. Jam.* 415; 6 *Cruise*, 414, 415, 418.

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§ 12. *The great case, Pells v. Brown.* In considering fee simple conditional, limitations conditional, or fees arising, and to be executed, on fees, this case has been a kind of *magna charta* in the law, cited by scores of authors, and never questioned. The case was thus: the father seized in fee of lands, and having three sons, William, Thomas, and Richard Brown, devised to Thomas and his heirs forever, paying to Richard £20 at his age of twenty-one, and if Thomas died without issue, living William, then to William his heirs and assigns forever, paying the said £20. Thomas entered and suffered a common recovery with single voucher &c., and devised to Pells and wife and her heirs. Thomas died without issue, living William, who entered on Pells and wife.

*Cro. Jam.*  
590, to 593,  
*Pells v.*  
*Browne.*

In this case the following points were resolved by the court:

§ 13. First. That Thomas had a fee, and not a fee tail, for it was devised to him and his heirs and assigns forever, also paying £20, both of which shew he had a fee. And the clause, *if he die without issue*, is not absolute and indefinite whensoever he die without issue; but it is with a contingency if he die without issue, living William; for he might survive William, or have issue alive at his death, living William, in either of which cases the contingency on which the estate was to go over to William, had never happened; and therefore, he never should have had it. William was only to have it, if in his life time Thomas died without issue. This was a conditional limitation over to another, if such an event happened; otherwise the estate was to remain as it was given to Thomas.

§ 14. Second. That this was a good limitation of a fee to William, not as a remainder; for this could not be, for when a fee was given to Thomas, there could be nothing remaining but by way of contingency (meaning executory devise) to de-

**CH. 114.** termine one estate and limit it to another, an act or event contemplated, as capable of taking place. But if an estate tail had been given to Thomas, and if he died without issue, living William, then to him, he might have had a contingent remainder depending on this estate tail: remainder, as there would have been an interest remaining after the estate tail, and contingent, as it was to vest only on the contingency of Thomas dying without issue, living William.

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§ 15. Third. That the recovery did not bind William; for Thomas had a fee, and William but a possibility; that is, to have the estate if he survived Thomas, and he died without issue.

§ 16. Fourth. That if, however, William had been vouched in and he had made himself a party in the recovery as vouchee by entering into warranty, he had been bound, for the value over should have been extended to him for reasons well stated by Fearn.

§ 17. Fifth. That in this case William having a mere possibility had no estate depending on that of Thomas.

§ 18. On this case it may be observed, that the doctrine of a legal time, as a life in being &c., was so little in use, that the court did not notice the fact, that the contingency was to happen in a life in being, as it was. William before the event happened could have no estate whatever in possession or in interest, but only the possibility of an estate, which might or might not arise in future, on a specified event taking place, an estate to spring up or come into existence, and to be executed on that contingency happening; and if it did not, then his interest could have no existence whatever. A fee cannot be in remainder on a fee; for the law does not expect the determination of a fee by one's dying without heirs, and therefore, cannot appoint a remainder to begin on the determination thereof. Had William in this case entered into the warranty on voucher, he had given "all his possibility," and had been *estopped* by his own act on record. In this case a contingent fee was limited on or after a vested fee; the first to take place when the last terminated in a time fixed.

2 Mass. R.  
554, Ray v.  
Enslin.

§ 19. This case was nearly that of the above case of Pells and Brown. A devised lands to his wife for life, and after her death "to my daughter and her heirs forever;" but she die before she comes of age, or have lawful issue of her if body begotten, then over to others. The court decided, that the daughter took a fee simple conditional.

3 D. & E. 143,  
&c. Porter v.  
Bradley.—

2 Fearn, 206  
v. Jeffry.—1

§ 20. Any words that limit the event to the legal time make this conditional fee or limitation; as where a devise was to 212.—8 Mod. 382.—3 D. & E. 555, Wilkinson v. South.—7 D. & E. 589, Roe v. Gulliver v. Wickett, cited 6 Cruise, 506, 450.

to P., his heirs and assigns ; but if he died, leaving no issue behind him, then over to another ; the court held, that P. had a fee simple conditional, and not a fee tail ; but his estate had been a fee tail if the words, *behind him*, had been omitted, for these words fixed the contingency at his death, and the estate over was executory, or an estate of no present existence, but capable merely of existence and of being executed. So the words, *then after his decease* to go over to another, or die and have no issue, are the same as leaving no issue behind him. And no particular words are required to limit the event within the legal time, but any will be fit which express the intentions of the parties.

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§ 21. The same is the case if the devise be to one and his heirs and assigns forever, and if he die without children, then over ; for dying without children confines the contingent event to his death, or a few months after.

2 Mass. R. 68,  
Richardson &  
al. v. Noyes  
& al.

§ 22. This was a devise to A and his heirs and assigns forever, and if he die "and leave no lawful heirs, what estate he shall leave to be equally divided between" C and D in fee ; the court held, that the devise to C and D is void, as inconsistent with the absolute unqualified interest of A. Dying and not leaving lawful heirs, is an indefinite failure of issue, but A has power to dispose of the estate ; and C and D can take only what he leaves &c. *Lawful heirs* here mean heirs of his body.

5 Mass. R.  
500, Ide v.  
Ide & al.

So an absolute fee to a fee simple conditional by a proviso. As where Robert Waith seized in fee, December 8, 1686, devised all his lands to his wife for life, and after his death to such child as she was then supposed to be pregnant with, and to its heirs forever, provided that if such child die before the age of twenty-one years, leaving no issue of its body, then the reversion of one third to the wife and her heirs ; of one third to the testator's sister, Elizabeth, and her heirs, and of the other third to the testator's sister Anne, and her heirs. The wife had no child. The testator died, leaving his wife and three sisters, Elizabeth, Anne, and Mary, his heirs at law. Resolved : 1st. That the devise to his wife for life, with remainder to said child in fee was good.

1 Wils. 105,  
Gulliver v.  
Wickett,  
cited 6  
Cruise, 443.

§ 23. Second. That the remainder was a good contingent remainder, because there was a freehold created by the same will to the wife to support it : but

§ 24. Third. If there had been no devise to the wife for life, the devise to the child being in *futuro* would have been a good executory devise.

§ 25. Fourth. That the devise being to the child and its heirs had been an absolute fee, if it had stopped there, "but the *proviso* which follows has contracted, and has made it a fee simple conditional."

CH. 114. not be known till after their deaths. And according to many  
 Art. 31. authorities, an executory devise, springing, or shifting uses,  
 &c. cannot before the contingency happens, be barred by a common recovery; for before it happens, this executory interest has no existence at all; hence there can be no recompense in value; as no valuation can be put on that which is not, and a supposed recompense is the ground of a recovery's barring &c. Cited also 2 Cruise, 357, 358.

§ 33. In giving effect to these executory estates, nothing has produced more uncertainty than words creating or supposed to create conditions. After hundreds of decisions, there is no settled distinction between conditions annexed to, and limitations of estates; or between words that actually create a condition by which one estate is defeated, and another arises, and words merely descriptive of the time when it shall arise; or between conditions precedent and subsequent. It has been long since found, that a legal condition, strictly adhered to, so often defeated the real intentions of testators, that judges have found themselves obliged, as it were, to get rid of them. For instance, one devises land to A, his heir at law, paying, or on condition he pay £20 to B, another son; A neglects to pay, and breaks the condition; and if treated strictly, as a condition, the right to enter for the breach of it descends on A, the heir of him who created it; it is evident he will not enter for his own neglect, and to defeat his own estate; then to do justice to B, the judges found themselves obliged to consider this condition, in abridgment, in fact, of A's estate, as a limitation, limiting his estate to continue only till he fails to pay, and on his failure to pay, *ipso facto*, and of course, putting an end to A's estate.

So if one devised land to A, his heir in fee tail, proviso if he aliened, then over to B; and A aliened, and so broke the condition, if the proviso be one, and then the right of entry for the breach of it descended on A, necessarily he would not enter to defeat his own estate; and if he did, B's contingent remainder fell to the ground, for by A's entry he defeated his fee tail, the prior freehold to such remainder to B, and thus defeated the testator's intentions as to B. A condition then was to be avoided, though in words created, and a limitation resorted to.

Cro. El. 26,  
 Lee v. Vincent.

§ 34. So in regard to these executory estates, the words, *not having issue*, or *not leaving issue*, have produced much uncertainty, because they have a *technical*, different from the *common* meaning. As in this case, A devised land to B, his second son in tail, and if he died not having issue, then over to C. A died; B had issue, D, and died, then D died without issue. Urged, C's remainder could not take effect because

B left issue; so the condition on which C's remainder was to take effect had not happened. But the court said, literally B could not be said to die not leaving issue, yet since that issue died without issue, by construction of law B was dead without issue whenever the issue failed; yet clearly in vulgar and common understanding, B had issue, though after his death his issue failed, and every man not acquainted with this kind of law would say B died leaving issue. The same construction was adopted in this case. As where A, when married, conveyed land to the use of himself for life, remainder to his first and other sons, in tail male, successively; and if he died without issue male, then to daughters for one hundred years, to raise portions for them. A had issue, a son and daughter, and died, and afterwards the son died without issue. Urged, she should not have the term, because A did not die without issue male, for he left a son, though he died without issue. But held, whenever the male issue failed, A might be said to be dead without issue male. So was *Stroud v. Andrews*, in Parliament, 2 Journ. 702, February 5, 1706. Many other cases are found in the books, in which this inconsistency has long existed between the common and legal meaning of the words, "*not having issue*," "*not leaving issue*," &c.; and judges have been long sensible of the evils of taking them in their legal sense; and especially since the great case of *Robinson v. Robinson*, in which it was so well and clearly settled that the testator's general intention, when consistent with the rules of law, must govern; and especially since it has been long agreed that testators generally have used these words in their common or vulgar meaning, and not in their legal. Hence, as Lord Mansfield said, judges will lay hold of any other expressions to get rid of this *legal*, and to adopt the *vulgar* meaning of them. Therefore, as applied to personal estate, the *vulgar* and not the *legal* has been long taken, as appears from some cases already cited, and will fully appear in Ch. 130, a. 6. Hence also the common cases, if one devise lands to A for life, or in tail, or in fee, expressly, but if he die not leaving issue, or without issue, then over to B, A has no fee tail, but one of the other estates as at first created expressly, though the words *not leaving issue* &c., in legal sense, so clearly imply a fee tail. The decisions in these cases have not been because implication does not control things expressed, but also because it has been usually conceived the testator meant A's not leaving issue at his death not indefinitely, which meaning ought, if possible, to govern in the construction of the will. Further, these words, not leaving, or not having issue, have been taken in the legal sense, not when used to express a condition, or merely the time when an execu-

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Goodyer v.  
Clerk, 5  
Bac. Abr. 814.  
Am. ed.

**CH. 114.** tory estate shall arise, or when one estate shall end, and another take place, on some act done, or event's happening, **Art. 31.** though on this point the authorities are not uniform. It is further to be observed, that the legal sense was adopted in opposition to the vulgar, in favour of the issue in tail, so in favour of estates in tail, and to give full effect to the *statute de donis*, in England, where estates tail have been much favoured, considerations now of no weight in our republic and jurisprudence, in which real estates descend and are distributed as personal, and in which estates tail are by no means favoured. Still however it is law here to take these words when applied to inheritances in the legal sense, especially if applicable to estates tail, if not controlled, or that sense defeated by other expressions, devises, or dispositions, in the same will or instrument creating uses and trusts, in which the intentions of the testator or grantor have been more regarded than in old and technical forms of conveyances, in which legal constructions have been most regarded. From these and other considerations it results, that in regard to these executory estates, or interests, there exist, in the United States especially, no solid reasons for continuing to take these words in this legal sense, as to real estates, but the reasons are clear and strong for taking them in the same sense as to *real* we do as to personal estate; this, and turning the condition at common law, for the breach of which the heir of him creating it only can enter, into a mere limitation of an estate, will avoid a vast deal of the most uncertain and troublesome kind of law in our books.

Cro. E. 378,  
Chomley v.  
Humble;  
same case, 1  
Co. 86.—Al-  
so 1 Co. 85,  
Corbet's case.  
—1 Co. 83.—  
6 Co 40,  
Mildmay's  
case, 2 Cruise,  
302, &c.

§ 35. So in regard to these executory estates it is material to avoid repugnant conditions, or limitations that destroy them contrary to the donor's intention. As where a feoffment was made to the use of A for life, remainder to B in tail, remainder to C in tail, remainder to D in fee; with a proviso, that if any of these in remainder in tail go about to levy a fine, or to do any act, whereby the uses limited, shall not take effect according to the limitation, or that there shall be any discontinuance, then the estate of him so going about shall cease, as if naturally dead, and not otherwise; held, this proviso was void, and the issue could not have it for the forfeiture; that the proviso, the estate cease on an act done, as going about &c., was void, and so as if the proviso had not been inserted, "so it is an estate tail, absolute and without condition." This was not the donor's intention; he meant, on such an act done by B or C, his estate should end at once, but he used words so uncertain as to be void, as the words *go about to levy a fine*; and then the estates the donor meant should be conditional proved to be absolute. But had the condition been, if

he enter into religion, then his estate to cease, it had ceased he so entering, and the land had descended to his son, as the law deemed him so entering dead. But said, if an act of parliament had been made, as above, it had been good, and made a descent to the son without death; but by conveyance no such descent can be made. An estate of inheritance in land cannot be made to cease by any conveyance, without some other act done; and an estate tail is as executed at common law, and cannot cease without entry. See *Cro. El.* 361, *Cogan v. Cogan*; see *Lovies' case*, 10 *Co.* 78; *Cro. Jam.* 61, *Loves v. Goddard*.

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§ 36. So if one by will, by covenant to stand seized, by feoffment to uses, or other conveyance, give or convey lands to A, his eldest son, or to his use, and his issue male, remainder in the same to B, and to each other son; proviso, if A or his issue, or any other son in remainder, attempt to alien &c., or shall alien &c., by which an estate be barred &c., then immediately after such attempt, and before any act executed, or immediately after such alienation, the use and estate of him so attempting, or aliening &c., shall cease, as if naturally dead, and to remain immediately to the persons to whom limited, or to him in the next remainder, &c. Held, the remainders actually vested as remainders in all the sons; but as to their taking effect in possession on breach of the condition or sooner or otherwise than they would have done, if there had been no condition at all, the *proviso* or condition was wholly repugnant and against law; for if a condition, on breach of it, the estate could not go over in remainder; for on such breach only the donor or his heirs could take advantage of it, not those in remainder, being strangers; and if the donor or his heirs entered for breach of condition, they defeated both the present estate and remainders depending thereon; if a limitation till they alien, yet it is repugnant that when by alienation the estate is actually settled and vested in the alienee, the same alienation should at the same time vest and settle the estate in another. As to the words *attempting, endeavouring, going about to alien*, they were so uncertain as to be utterly void, and tended to perpetuities. See *Cro. Jam.* 696, *Foy v. Hynde*. The testator devised to his sons in tail, remainder in tail male to his nephew, Henry Keyleway, till he went about to alien &c. &c., and if he did so, the testator devised to his nephew, Thomas Keyleway, in tail male, with a like condition, devise over if he did so, to W. and R. and C. severally. The estate came to Henry, he had issue R., and they levied a fine to the deft.; Thomas left issue the plt's. lessor. Held, a perpetuity and against law, for one might not end such estate tail in such a way for ages: 2. The testator

5 *Bac. Abr.*  
809, 810.—1  
*Co.* 88.—10  
*Co.* 36.—9  
*Co.* 127.—6  
*Co.* 40, cited.

Foy v.  
Hynde.

CH. 114. could not give title to Thomas &c., a stranger, to enter : 3.

Art. 31. The fine divested his remainder, though vested in interest, so he could not enter. No limitation to enter but after the effectual going about, and not effectual till the act done, and when done the remainder was discontinued, and then Thomas could not enter. Thomas' estate could not be preserved but by making it an executory devise ; this could not be done, as it rested on estates that made it a remainder. In this case also, the testator defeated his own purposes by annexing illegal conditions in disposing of his property.

§ 37. *In what sense a particular estate must exist to support a vested remainder, that is vested in interest only, not in possession.* A particular estate at first must be created to give existence to such a remainder, for *ex vi termini* there is no remainder but on a particular estate created at the same time and by the same instrument. But it is said no particular estate is necessary to support a remainder, because it is vested presently in the person to whom limited. And any particular estate is sufficient, but one at will ; on this a remainder is void, as by limiting the estate over the will is instantly determined, then the remainder is void for want of a particular estate whereon to depend. And in possession it cannot be good, because it was limited as a remainder, and not as a present estate ; then, though the remainder be vested in interest to vest in possession on a certain event, and the particular estate is destroyed before the event happens, the remainder must cease. Vest in possession it cannot before its appointed time, and in its nature it cannot exist as a remainder where no particular estate exists. And in the mean time, as before stated, there is no tenant of the freehold, who must ever be in possession to answer to actions &c. ; the tenant for life is not the tenant of the freehold, as the estate of this particular tenant for life exists not ; and the remainder-man cannot be this tenant of the freehold, for as yet he has no right to be in possession. It is common to say a vested remainder wants no particular estate to support it. This is inaccurate, as applied to a remainder vested only in interest, and not in possession ; for wherever the remainder is so situated, there must be a prior estate and an existing freehold tenant in possession, and the remainder must be limited and given out the very moment the particular estate is created ; for if not, this leaves a reversion that immediately settles in the lessor or grantor, and draws to it the rents and services, and then a remainder limited after comes too late. Doct. & Stud. lib. 2, c. 20. If A grant a lease to B for life, and confirm his estate for life, remainder after his death to C, this remainder is void ; as the confirmation gives B no new estate, nor enlarges his old one, he is but

tenant for life as before ; so the remainder is void, because limited after the particular estate had taken effect ; so a reversion was settled in A, bad as a grant of the reversion, not being meant as such ; also, because C is not party to the deed, and such a one cannot take but by remainder, according to several books. 5 Bac. Abr. (Am. ed.) 822. And it is of the very essence of a remainder it take effect by the same deed, and at the same time with the particular estate. Plow. 160 ; Dyer, 126 ; Co. L. 317 ; Lit. sect. 573 ; 2 Roll. Abr. 415. But the remainder is good, if when given the prior estate be enlarged, for this makes it a new estate at the time the remainder is created. In every *formedon* in remainder the *esplees* must be laid in the particular tenant. And every remainder is void which can never vest in possession, as one to B, during the life only of a prior tenant entitled to the possession all the time the remainder is to continue. 2 Co. 50. Lord Coke holds, when the particular estate and remainder depend on one title, to defeat the first is to defeat the last ; but if the first be defeatable and the last not, then to defeat the first is not to defeat the last. Co. L. 298. But *quære* of the last part of this rule. And he states that if one lease to A for B's life, remainder to C in fee, and A dies, and now till an occupant enters there is no particular tenant, yet C's remainder is good, and continues, as it vested in him presently by the first limitation. It is not defeated by the want of a tenant to the first estate once well vested. *Id.* But here the first estate is not destroyed ; but exists open to receive an occupant. But at common law till the occupant enters who is the tenant of the freehold to answer to actions &c. ?

§ 38. *The particular tenant conveys, when he forfeits, and the effect on the remainder or reversion &c.* Tenant for life or for years of lands &c. lying in livery, makes a lease for life, a gift in tail, or feoffment in fee, levies a fine, or suffers a recovery ; these acts displace and divest the remainder or reversion, but make no bar or discontinuance ; for he in remainder or reversion may enter presently, for the forfeiture, Co. L. 252 ; Cro. Car. 157, 368 ; Cro. El. 220, 254 ; because the conveyance by tenant for years or for life in possession, is a breach of trust,—and for a forfeiture. And if lessee for life makes a feoffment in fee, he in remainder or reversion for life, in tail or in fee, may enter for the forfeiture. And if the first in remainder do not, the second or third may, to the use of the others and by reason of his own interest ; and so may their heirs, 9 Co. 106, for the feoffment divests their several remainders and gives them a title of entry in their turns, 2 Inst. 118 ; that is, when vested in interest divests them and turns them to a right.

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See Estates  
by forfeiture,  
Ch. 136, and  
Estates by  
Entry, &c.  
Ch. 132.

## CHAPTER CXV.

## COVENANT OF SEIZIN, OF RIGHT, OF WARRANTY, AND AS TO INCUMBRANCES.

ART. 1. *General principles.* § 1. In our deeds the grantor usually covenants, that he is lawfully seized in fee of the granted premises; that he has good right to sell and convey them; that they are free of all incumbrances; and that he will warrant and defend them to the grantee, his heirs and assigns, against the lawful claims of all persons. These are his covenants generally; sometimes he only covenants and warrants against himself and those claiming under him. When one sells lands or real estate, as executor, administrator, or guardian, by license or order of court, he usually covenants only that he has obtained legal authority therefor, has duly advertised the sale, taken the oath required by law, and taken the other steps the law required. These last are considered as special warranties. No statutes have been passed in this State respecting warranties, or real covenants as such. A warranty can be only by the word *warrant* in deed or an express warranty; but a conveyance is perfect without it.

5 Johns. R.  
68.

§ 2. In all these cases the contract is strictly a covenant by our practice, always followed, if broken, by damages to the covenantee or warrantee; "for there never has been a judgment in this State over against the vouchee for lands and tenements of equal value," except nominally in common recoveries in favour of the voucher.

§ 3. *Principles of these covenants.* A man may covenant that he is seized, or that he is lawfully seized, and it is but his contract or engagement he is so seized. So he may covenant that the property he conveys is free of incumbrances; so that he has legal power to convey it, and that he will defend it against the legal claims of others; and that if he fail in these respects, he will pay damages assessed according to law. This "warranty may be annexed to any conveyance whereby an estate passes, or to a release or *confirmation* made to the tenant of the land, by one who never had any estate therein." So one may warrant more than passes from him; hence each joint-tenant may warrant the whole, though he conveys but a moiety.

Co. Lit. 388.  
—Noy's Max.  
102, 103 —  
Co. Lit. 186.  
—3 Bac. Abr.  
206.

3 Bl. Com.  
165.—5 Bac.  
440.

§ 4. But a warranty must be on the sale; if made after it, it is void as being without consideration. And it is said in some books, that a warranty can only reach to a thing in be-

ing when made, and not to things in future, as that a horse is sound at the buying of him, not that he will be sound two years hence." But Lord Mansfield held, you may warrant a future event no doubt, "as that the ship shall continue neutral during the voyage." CH. 115.  
Art. 1.  
Doug. 734.

§ 5. If a collateral warranty be annexed to an estate as one for three lives, it does not bind after the estate is determined. So the warranty binds no longer than the estate exists to which it is annexed; as if the ancestor of the reversioner release to tenant for life or years with warranty, and afterwards he dies, or the term ends, he in reversion may enter. And if one warrant with a minor he warrants the whole. 4 Com. D.  
288, 289.  
Co. Lit. 367.

§ 6. At common law a collateral warranty was the only security of purchasers, and for the support of estates by title, as by descent &c., and hence favoured as such estates are favoured, and there was no need of lineal warranty. A "collateral may be taken notice of as well by evidence as rebutting." 12 Mod. 512.  
—11 Mod.  
103.—10 Co.  
96.

§ 7. *Warranties what, and the several kinds.* "A warranty is a covenant real, annexed to lands and tenements, whereby one is bound to warrant the same." "And when one brings an action to recover the lands which he is bound to warrant, the tenant may plead the warranty in bar, which is called a *rebutter*." "And at law all warranties not commencing by disseizin, which descended to the heirs of him that made them, barred the heirs to demand the land against them," if the estates were freeholds; but not if the demandant's estate was not divested out of him at the time of the warranty. And there must be some estate to which the warranty is annexed that may support it, "for if one covenant to warrant land to another, and makes him no estate, or makes him an estate that is not good, and covenants to warrant the thing granted, in these cases the warranty is void." If "one makes a lease for years of land, and binds himself and his heirs to warrant the land; this is no good warranty, neither will it have the effect of a warranty; but this may amount to a covenant, on which an action of covenant may be brought." Co. Lit. 365,  
370, 374.—  
1 Sul. Lect.  
290, 300.—  
4 Cruise, 49.  
—Co. Lit.  
378, 384, 386.  
—10 Co. 96.  
—1 Ld.  
Raym. 36.—  
Vaugh. 360.

§ 8. And Lord Chancellor Cowper said, that a "collateral warranty was certainly one of the harshest and most cruel points of the common law, because there was not so much as a pretended recompense." 10 Co. 96,  
Seymore's  
case.—5 Bac.  
441.—See  
Ch. 109, a. 8,  
s. 5.—5 Co.  
71, case of  
Spencer.

§ 9. By the common law a warranty always descended to the heirs of him that made it, and to the heirs of him to whom it was made, and if A was tenant in tail male, remainder to B, his brother, A's warranty descended on his daughter, not on B, so B was not barred; for the "warranty always descends to the heir at law of him that made it," and not on the 10 Mod. 3, 4,  
Earl of Bath  
v. Sherwen.  
Co. Lit. 12.  
Co. Lit. 376.

CH. 115. heir in *Borough English*, or on any particular custom, as of Art. 1. *gavelkind*, &c.

§ 10. *Warranty lineal*, is where the heir derives, or may derive by possibility, his title to the land warranted, either from or through the ancestor who made the warranty. As where the father, or any elder son, living the father, released to one who disseized such father, elder son, or grandfather, with warranty, this was *lineal* to the younger son, and bars estates in fee, but not in tail without assets, by West. 2, (Inst. 374,) is the statute *de donis*, 13 E. I. See Assets in a subsequent chapter.

§ 11. *Collateral warranty*. This is where the heir's title to the land neither was nor could have been derived from the warranting ancestor. "As where one disseized the father, and the youngest brother released with warranty to the disseizor, this is collateral to the elder brother." So where in England the mother warranted, and the son claimed the land from the father; for the son by no possibility could claim the father's land through the mother, and so the warranty is collateral; but it would be lineal if he, on whom it descends, might possibly have claimed the land as heir to the warrantor.

Co. Lit. 368.  
—Sym's  
case, 8 Co.  
102; cited 4  
Cruise, 61.

§ 12. The warranty of the middle son is lineal as to the youngest, and collateral as to the oldest. So the warranty of three coparceners is collateral as to each other. So of *baron and feme*, of her land, is as to her heir collateral, as in *Smith v. Lyndal*; though her warranty alone would be lineal as to him.

§ 13. *Warranty by disseizin*, is whenever a conveyance, to which the warranty is annexed, immediately follows the disseizin, or operates itself as such, it is a warranty commencing by disseizin, and binds no heir, as it begins in force and wrong. As where the father, tenant for years, remainder to his son in fee, aliens in fee with warranty, it is null and void.

5 Co. 80, 81,  
Fitzherbert's  
case.—Co. L.  
366, 367.—  
Cro. Car. 483,  
same case.

§ 14. In this case the father was tenant for life, remainder to his son and heir apparent in tail, and the father by *covins* with A and B, to bar his son of the remainder by collateral warranty, made a lease for years to A, who enfeoffed B in fee, to whom the father released with warranty; this descended on the son. This is a warranty commencing by disseizin, and is void; for the feoffment by the lessee for years was a disseizin, and the father was *particeps criminis*, though his release was made long after the disseizin.

1 Bl. Com.  
302.

§ 15. In lineal and collateral warranty, the heir was bound in case the warrantee was evicted, to render him other lands, only on condition he the heir had other sufficient lands by descent from the warranting ancestor. To make this consistent with Co. Lit. 365, above, they presumed assets in collateral

warranty, and the lands demanded in lineal, assets, if recovered, must be intended as explained below ; yet in lineal warranty he was barred, assets or no assets ; that is, barred from claiming the lands, for as soon as he recovers the lands they are assets, and must go to the warrantee ; and therefore if a recovery was admitted, the land finally would be left with the warrantee, where the heir's claim would find them, or at least the value thereof in other lands or money.

CH. 116.

Art. 1.



Ejectment for two undivided third parts of a messuage &c. In 1744, Thomas, Gilbert, and Henry Brown became seized, as tenants in common and in tail, of the whole estate, and in possession. Gilbert released his undivided part, and all his estate and interest therein to Thomas and Henry, and their heirs ; to hold to them, their heirs and assigns, as tenants in common, and not as joint-tenants, to the use of them, their heirs and assigns. And Gilbert covenated with Thomas and Henry, their heirs and assigns, that he, his heirs, executors, &c. would warrant, and forever defend, the premises to the said Thomas and Henry, (omitting their heirs,) against himself, his heirs, &c. and all persons, and that they, their heirs, and assigns, should peaceably enjoy. Henry died, leaving two sons. Then Thomas died intestate, and without issue, leaving Gilbert his heir at law ; he conveyed by lease and release his interest to the plt's. lessors, in fee, having levied a fine, and suffered a recovery of a moiety of the whole estate, and died unmarried. Henry's eldest son died leaving two daughters, who defended for an undivided fourth part of two-thirds, they and those they claimed under, they having been in possession ever since 1752. Held, Gilbert's release passed his interest to Thomas and Henry, as tenants in common : 2. That Gilbert's warranty, annexed to his said release, created a discontinuance of his estate tail, and barred him and those claiming under him, (so the plt's. lessors,) as against those claiming under the release of an after acquired estate in fee. Judgment for the defts.

4 Maule & S.  
R. 178, 183.  
A. D. 1816.

§ 16. So the heir was barred in collateral warranty, though no assets descended, on the idea he might afterwards have assets from the warranting ancestor. So that at common law every warranty descending on an heir rebutted or barred him to claim when plt. the warranted premises, but when vouched or sued as deft., in a *warrantia charta*, he was held to answer over in value, only so far as he had assets from the warrantor.

2 Bl. Com.  
302.—4  
Maule & S.  
178.

§ 17. *Cestui que use* may take advantage of a warranty annexed to the estate. Rights of entry are bound by collateral warranty, and the plt. in ejectment may make title by it. But though a warranty binds and bars, it does not extinguish a right.

2 Salk. 686,  
Smith v.  
Tundall.

CH. 115. § 18. If the vendor has possession of goods, a bare affirmation they are his is a warranty, but not so if not in possession.

Art. 2.



But as to lands such affirmation makes no warranty, in possession or not. Salk. 210, *Jud v. Stoughton*.

4 Dall. 168.

§ 19. The collateral warranty of the ancestor operates as an estoppel, the statute of 4th Anne, c. 16, not extending to Pennsylvania, and doubtful if to Massachusetts.

ART. 2. *Alterations by statutes.*

Co. Lit. 388.

—2 Bl. Com.

302, 303.—6

Ed. 1., c. 3.

British statutes.

§ 1. Warranties thus bar in all cases, except where commencing by disseizin, were found to be very inconvenient; therefore the statute of Gloucester, 6 E. 1, c. 3, was enacted, by which it is provided, "if tenant by the curtesy, or husband seized in right of his wife alien with warranty and die, this collateral warranty shall be no bar to the heir in *mort d'ancestor* without assets, in fee; but if assets descend to him from the father, he shall be barred, having regard to the value thereof." Other writs are also intended.

11 H. VII.  
c. 20.

§ 2. "Tenant in dower, by alienation with warranty, might bar the heir, till 11 H. VII., c. 20." By that act such warranties were made void, as to the heirs of the father, though also heirs of the mother, and as to those in reversion &c., and gives them an immediate right to enter &c. This act of 11 H. VII. c. 20, enacts, "that if any woman having any estate in dower, or for term of life, or in tail, jointly with her husband, or only to herself, or to her use, in any lands, tenements, or hereditaments of the inheritance or purchase of her husband, or given to the said husband and wife in tail, or for term of life, by any of the ancestors of said husband, or by any other person, seized to the use of the said husband, or of his ancestors, shall, being sole, or with any other after taken husband, discontinue, alien, release, or confirm with warranty, or by covenant, suffer any recovery of the same against them, or any of them, or any other seized to their use, or to the use of either of them, after the form aforesaid, all such discontinuances, alienations, releases, confirmations, and warranties, so had and made, shall be utterly void."

§ 3. And "that it shall be lawful to every person and persons to whom the interest, title, or inheritance, after the decease of the said woman, of the said lands, tenements, and other hereditaments, being discontinued, aliened, or suffered to be recovered, in the form aforesaid, should appertain, to enter into all and every the premises, and peaceably to possess and enjoy the same in such manner and form as he and they should have done, as if no such discontinuance, warranty, or recovery, had been had or made."

§ 4. And "that if any of the said husbands and women, or any other, seized to the use of them of the estate afore

specified, do make or cause to be made or suffer any such discontinuance, alienations, warranties, or recoveries, in form aforesaid, that then it shall be lawful to the person or persons to whom the said lands or tenements should or ought to belong, after the decease of the said woman, to enter into the same, and them to possess and enjoy according to such title and interest as they should have had in the same, if the same woman had been dead ;” provided the wife shall not be affected or prejudiced by the act of the husband, or by her own act while a *feme covert*.

§ 5. And “that if the said woman at the time of such discontinuance, alienations, recoveries, and warranties, in the form aforesaid, had and made of any of the premises, be sole, that then she shall be barred and excluded of her title and interest in the same from henceforth ; and that the person and persons to whom the title, interest, and possession, of the same, should belong after the decease of the said woman, shall immediately after the discontinuances, alienations, warranties, and recoveries, enter into the same lands, tenements, and other hereditaments, and them possess and enjoy according to his title in the same.” But this act does not take effect where those in remainder or reversion assent to the alienation on record, nor does it prevent such woman from disposing of her estate for the term of her life only.

§ 6. There is no doubt but these statutes have been adopted in this State ; but some doubt if this statute of Anne has been adopted here. This statute enacts, “that all warranties made after, (first day of Trinity term, 4th of Anne,) by tenant for life, of any lands, tenements, or hereditaments, the same descending or coming to any person, in reversion or remainder, shall be void and of no effect ; and likewise all collateral warranties which shall be made after, (said day,) of any lands, tenements, or hereditaments, by any ancestor who has no estate of inheritance in possession in the same, shall be void against the heir.”

§ 7. Now tenant in tail being more than tenant for life, may yet bind the remainder or reversion by collateral warranty without assets, if the warranty descend on him in remainder or reversion, (though this act be adopted here,) “for the judges in expounding the statute *de donis*, held, that by analogy to the statute of Gloucester, a lineal warranty, by tenant in tail, without assets, should not bar the issue in tail ; yet they held such warranty with assets to be a sufficient bar.

§ 8. They also held, that a collateral warranty was not within the statute *de donis*, as that act was principally intended to prevent tenant in tail from disinheriting his own issue ; and therefore, collateral warranty, though without

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Art. 2.

3 & 4 Ann, c. 16.—2 Bl. Com. 303, Not adopted in Pennsylvania.—4 Dall. 168, as to collateral warranty.

2 Dall. 91, caveat emptor applies to real estate only.

CH. 115. assets, was allowed to be, as at common law, a sufficient bar  
 Art. 3. of the estate tail, and all remainders and reversions expectant  
 thereon, and so it continues to be, notwithstanding the statute  
 of Anne, if made by tenant in tail in possession." So his  
 warranty with assets bars his issue, and without, bars such of  
 his heirs as may be in remainder or reversion.

Salk. 685.

§ 9. The wife seized in fee married A, and they levied a  
 fine to both of their uses for their lives, remainder to A, the  
 husband, and his heirs with warranty. Held, that this war-  
 ranty of husband and wife is collateral to her heir, and he is  
 bound by it; for she may warrant in a fine, and had an estate  
 of inheritance in possession, but her warranty alone had been  
*lineal*.

§ 10. Thus all warranties not commencing by disseizin  
 bound those on whom they descended at common law, and  
 the three statutes and that of West. 2, above mentioned, are but  
 exceptions to this general rule; and in England all warranties  
 yet so bind not made void by these statutes. "The reason  
 why a warranty was a bar at common law, was, for that no  
 one was presumed to prefer the posterity of another to his  
 own, and no proof was admitted against this presumption."  
 And the general reason of a warranty's binding the heir is on  
 the idea the ancestor would not warrant and exclude his heir  
 from the land, without leaving an equivalent in other lands or  
 monies, which purchased lands to descend with the warranty.  
 And in cases of lineal warranty, the lands demanded are assets  
 if recovered, generally.

Co. Lit. 373.  
 5 Bac.  
 Warranty.

2 Bl. Com.  
 301.—  
 4 Com. D.  
 286.

§ 11. In conveyances now it is necessary to add an express  
 clause of warranty to bind the grantor and his heirs, and the  
 word *warranty* must be used; it is not, however, essential in  
 our covenants to answer damages in an action to be brought  
 against the covenantor, his executors, or administrators.

2 Bl. Com.  
 301.—2 Bl.  
 Com. 300.—  
 Co. Lit. 174.

§ 12. After partition or exchange of land of inheritance, if  
 one or his heirs be evicted of his part, the other is bound to  
 warranty, because he enjoys an equivalent. And such war-  
 ranty is inferred justly from the act of partition or exchange.

ART. 3. *Assets*. § 1. In considering covenants of war-  
 ranty &c. assets are material to be taken into view, because the  
 heir of them who enters into this covenant is not bound to de-  
 fend further than he has assets by descent from his warranting  
 ancestor, by the English and by our law in several of the  
 States.

4 Cruise, 53.

In Syms'  
 case, 8 Co.  
 104.—1 Inst.  
 374.—  
 1 Cruise, 22.

§ 2. *Lineal warranty follows assets*. "Lineal warranty is  
 not a bar to the issue in tail without assets; and assets are to  
 be adjudged according to the value, which may be more or  
 less; for this reason lineal warranty ought to follow the assets,  
 because without them it is no bar. As in *formedon* for four

acres, each of the yearly value of 12*d.*, and warranty and assets pleaded, issue on assets, and found one acre of the value of 12*d.* descended, and the court held, it was no bar but for one acre; for the assets descended are but the one acre." And this by the statute above cited.

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Art. 3.

§ 3. *Real assets, what.* "Assets requisite to make a lineal warranty a bar, must be of equal value with the land which it bars one to demand, and descend from the same ancestor that made the warranty; and it must be a real inheritance in estate or interest, not a bare use, or a right of entry or action, which are not assets till they are reduced to possession; but rent issuing out of the heir's land descending to him, whereby it is extinct, is assets," for it is continued to such purpose.

Co. Lit. 374.  
6 Co. 68.—  
2 Cranch,  
407, 444.—  
1 Cruise, 168.  
—3 Cruise,  
337.—1 Com.  
D. 547.

§ 4. If the heir have the freehold and inheritance descend to him from his ancestor, he has complete assets; that is, from the same ancestor that made the warranty.

Farr. R. 42.

§ 5. And lands descended to the heir are assets in his hands before entry. And if he take by descent assets, though devised, for then he takes as if they were not devised, descent is his better title.

Watkins'  
Law of De-  
scents, 39.

§ 6. So a reversion after a term of 500 years, is immediate assets in the hands of the heir by descent. So is a reversion after an estate tail, come into possession, and though the land be in Ireland; and so if one devise to the heir, he takes by descent. So a reversion on a life estate is assets, because it may be sold immediately:—and *quando acciderint*. 1 *Ld. Raym.* 53.

2 Wils. 49,  
Villers v.  
Handley.—  
1 Com. D.  
546.—Stra.  
1270.

§ 7. But lands in tail are not assets; for it must be a fee. Nor can a term in trust now be assets in law; and so a rent seek in fee, or a right of entry or of action is not assets till he has recovered seizin. 6 *Co.* 58. So if land be devised to the heir, it is not assets, if he take by the devise; as if land be given to him and his heirs on condition to pay debts. So if land be devised to two daughters and their heirs; for they shall take jointly and not as parceners, and so not by descent, and the estate is not assets, as it does not descend to these daughters and heirs.

2 Mod. 286,  
Brittain v.  
Charnock.—  
Cro. Car. 161.  
—Cro. El.  
431.—1 Com.  
D. 548.

§ 8. So if *gavelkind* lands be devised to two sons and their heirs equally to be divided, these lands are not assets, for they take by purchase as tenants in common. In these cases the warrantor may sell or devise his lands, and he may make his heirs purchasers, then they do not take them by descent, and so they are not assets; and it is very easy for him thus to make them purchasers.

1 Leon. 315.

§ 9. Warranty descends on two, one has assets by descent to the value, that one shall be barred because he has an equivalent in assets from the warranting ancestor. Warranty de-

8 Co. 103,  
104, Syms'  
case.—Salk.  
79.

CH. 115. scends on two heirs, both are vouched, one has nothing, the other shall render the whole having assets sufficient.

Art. 3.

1 Com. D.  
548—Toller,  
139, &c.—  
Dyer, 264.

§ 10. *Personal estates, what.* "All chattels, real or personal, which come to the executor or administrator, shall be assets in their hands for payment of debts and legacies." See also, Ch. 9, a. 19.

§ 11. So if land be devised to an executor to be sold, this before sale shall be assets; contra 2 Vern. 106; but Vernon holds, the money after sale is assets. See 2 H. IV. 21.

2 Vent. 358.—  
1 Com. 549.

§ 12. So if one die seized of land in fee in a foreign plantation, this is assets in the executor's hands to pay debts.

2 Vern. 717.  
—1 Com. D.  
549.

§ 13. So an estate limited to A, his executors and administrators for three lives, was deemed assets in the executor's hands at common law.

1 Roll. 92.

§ 14. So if an infant executor come to full age, goods in the hands of the executor *durante minore etate* are assets, though he has not the possession.

1 Com. D.  
550.

§ 15. So if an executor deliver goods to merchandise, the profits shall be assets. But *quare*, if at the executor's risk.

Salk. 79,  
Buckley v.  
Pirk.

§ 16. So if a person has a lease rendering rent, the profits above the rent are assets. Toller's L. Exrs. 141, &c.

1 Com. D.  
550.—Cro.  
Car. 373.—  
Cro. El. 43.

§ 17. So if a debtor be made executor by his creditor, whereby the debt is extinct, yet it is assets, and the debtor must account for it to the estate of the creditor; and so if the creditor make the debtor and another his executor. So if an executor release an account; so much as appears due on it is assets, to be so accounted for.

3 Salk. 156.—  
9 Co. 91,  
Bane's case.  
—Cowp. 284,  
Atkins v. Hill.

§ 18. Assets any where are assets every where, and the law presumes executors have assets till the contrary appears, and so need not be averred, and the executor or administrator must shew the want of them. And *assumpsit* lies against an executor on a promise to pay a legacy in consideration of assets.

Salk. 207,  
Jenkins & ux.  
v. Plumb.

§ 19. So if A owed the testator money and paid it to a third person by consent of A's executor, it is assets in his hands, or if without his consent, yet if he sue and get judgment against the third person for it, this is assets before execution. But if an executor sue and get judgment, it is not assets till levied by execution; and the reason of the difference is, when recovered against the testator's debtor the old debt remains, but when recovered against a third person, who never was debtor to the testator, the original debtor is discharged. But *quare*, if there be a recovery, till payment? A right to redeem is assets. 1 Cruise, 139.

1 Cro. 114,  
Crossman v.  
Reed.

§ 20. If the obligee's executrix marry the debtor, and the debtor die, the debt is not assets in her hands; for by the marriage the debt is only suspended, and the action is revived

against the debtor's representatives. Only the remedy, not the right is suspended by the marriage. CH. 115.  
Art. 3.

§ 21. If the executor take a bond of the debtor, however poor, it is assets, if the debt to the estate be discharged. 12 Mod. 346.

§ 22. Where the debtor is made executor, it is not an actual release, but by way of legacy, and is assets; and where a debt or a part of it, is expressly devised to pay a legacy, it will be assets to pay it: and if the obligee be made executor he may retain assets to pay it, the action is suspended, as he cannot sue himself, but if he die, his administrator may sue the representatives of the testator. Salk. 303 —  
3 Salk. 163.

§ 23. If the testatrix never had actual possession of the goods in her life, they were not assets till recovered. And if lands be devised to be sold for a special purpose, as to pay daughter's portions &c., the money arising from the sale is not assets. And if a house with the goods be leased for years, rendering rent, and the executor receive it after the testator's death, it is not assets, for it belongs to the heir. So lands devised for payment of debts and to be sold, are not assets in law till actually sold. So *choses in action* are not assets till recovered. 4 D. & E. 281,  
Cockerill v.  
Kynaston.—  
Hob. 265.—  
1 Com. D.  
560.—Dyer,  
161, 361.  
1 Rol. 920.—  
1 Com. D.  
561.

§ 24. So goods in the possession of the testator at his death, though the property and possession are by law vested in the executor, yet if without fraud or collusion, he never had actual possession of them, shall not be assets to charge him. So if lost, as if sheep or other beast die, or a ship perish by tempest or the testator's goods be destroyed by enemies or be stolen. So goods in his hands as trustee for another are not assets. So if a bond be given to A in trust for B, it shall not be assets in the hands of A's executor. So if a bond to A be assigned to B with a covenant not to revoke, it shall not be assets in the hands of A's executor. 1 Salk. 79.

§ 25. It is not an admission of assets for an administrator to submit to an award, and if an administrator promise to pay the intestate's debts, it is *nudum pactum* if there be no assets. 5 D. & E. 6,  
8, Pearson  
v. Henry,  
admr.  
7 D. & E. 457.

§ 26. If A owe B £100, and is made B's executor, A actually receives so much money, and is answerable for it, and if he do not administer so much, it is a *devastavit*. Salk. 306.

§ 27. In this action the court decided, that if an executor or administrator confess judgment, or be defaulted, he admits assets, and is estopped to say the contrary, in an action on such judgment, suggesting a *devastavit*. 1 Wils. 258,  
Shelton v.  
Hawling  
exr.

§ 28. *Assets sold*. But according to a case cited in Sym's case, if one have assets, as an acre of land, by descent, and sell it before vouched on a lineal warranty, it is in law no assets: see post, Voucher. But at common law, if the heir alien-

8 Co. 104,  
Sym's case.  
—1 Com. D.  
547.

CH. 115. ed the assets by fraud, before an action commenced, he was  
 Art. 4. charged, and by 3 and 4 of W. & M. c. 14, if the heir alien  
 assets before an action is brought against him, he shall be liable to the value of the land sold. Also by the same act the devisee is liable, though he alien the land devised before action commenced. But it has not as yet been decided that this statute has been adopted in this State; but was adopted in the States south of Virginia.

ART. 4 *English cases as to covenants of warranty &c., further pursued.*

Go. Lit. 376. § 1. "If a gift be made to A in tail, remainder to B in tail, remainder to C in tail, (three brothers,) and A discontinues with warranty, this is collateral to B and C, for the remainders are their titles, and to those A is collateral;" for they cannot claim from A, but above him *per donum*: this collateral warranty bars, since the 4 and 5 of Anne, for A had in the land an estate of inheritance, and that act only avoids collateral warranties made by one having "no estate of inheritance in the land," so that statute does not apply.

Co. Lit. 376. § 2. "A personal lien descends on all the heirs, as if an  
 8 Co. 104, &c. obligor die seized of *gavelkind* lands, debt lies against all  
 Syms' case. his sons."

Co. Lit. 384. § 3. "If the feoffor, by the word *dedi*, warrant, and add a  
 —1 Co. 96. special warranty, against J. S., and his heirs, yet *dedi* gives a  
 —6 Co. 18. general warranty against all men, during the life of the feoffor." So a general warranty for life of the grantor, and his special one in fee, in the same conveyance.

Doct. & Stud. § 4. *Collateral warranties binding or not—cases.* If A,  
 74, 261, 262, tenant in tail, be disseized, and die leaving B, his heir in tail,  
 266. and C, an ancestor collateral to B, release with warranty and dies, and the warranty descend on B, he is barred in law. This was before the 4 and 5 of Anne, nor does it appear whether C had an estate of inheritance or not; if he had, this statute did not affect the warranty; nor does it here if the act be not adopted here. So if A, seized of lands, is disseized by B, and C knowing of the disseizin buys them of B, and gives release with warranty of D, a collateral ancestor of A, who also knows of the disseizin; D dies, and the warranty descends on A, he is barred in law, but not in conscience; for none of the statutes take these cases out of the common law principle, whereby all warranties bound and barred. But *quare* if this was not before the 3 and 4 of Anne. And *quare* as knowing of the disseizin, when he purchased, and when he got his warranty, if it were not a warranty commencing by disseizin; and see the case of Fitzherbert, above.

5 Co. 80. § 5. So where A was tenant for life, remainder to his son and heir apparent in tail, A made a feoffment in fee, with

warranty, and died, this warranty descending on the son bound him, there being no covin or disseizin. And though a warranty binds or bars, it does not extinguish a right, and so it bars no longer than the warranty is in force, and if released the old right revives ;—was before the 4 and 5 of Anne.

CH. 115.  
Art. 4.

§ 6. But if one joint-tenant make a feoffment of the whole, with warranty, it is bad for a moiety.; for as to a moiety it commences by disseizin, and binds no one.

Salk. 685.—  
Lit. sect. 700,  
708.—4 Com.  
D. 288.  
4 Com. D.  
288.

§ 7. So if the father be tenant for years, or at will, of the son's land, and make a feoffment with warranty, and it descend on his son, he is not barred ; for it commences by disseizin. The same of a guardian in *socage* ; or for *nurture* ; or of an *abator* ; for in these cases the warranty was void at common law, as commencing by disseizin, the livery of seizin made by such tenants &c. being a disseizin.

§ 8. "The civil law bound every man to warrant what he sold, but the common law does not, without a warranty in deed, or in law, for the rule is, *caveat emptor*."

Co. Lit. 102.

§ 9. The plt. in ejectment may make title by collateral warranty, so rights of entry into lands are barred by it.

Salk. 685.


§ 10. So if a disseizin be made with an intent to make a feoffment, or to have a release with warranty, the warranty will be void, though it be not a disseizin and warranty together, as is exemplified in Fitzherbert's case, above stated.

Co. Lit. 367.

§ 11. *This was lineal warranty.* Henry Winter gave lands to his son Stephen, and the heirs male of his body &c., remainder to his son John, and the heirs male of his body &c., remainder to Alice Winter, and her heirs. Stephen and John died without issue, and the demandant, Game, was son and heir of Alice. Said Stephen levied a fine to William Brown, with general warranty, after which John died without issue, and then Stephen died without issue, after which the said said warranty of said Stephen descended to Alice, and one A, as his sisters and heirs. She died, after which the said warranty descended to Game, the demandant &c., who brought a writ of *formedon* ; and the question was, if he was barred. And it was held, that Alice and her heirs were barred for the whole ; for the warranty is entire, and extends to the whole land, and is a bar to every person to whom it descends of all right which she had in the land ; and if Alice and A had right jointly, or severally, each is barred ; or if she had right for all, and A none, she is barred for the whole, and so her heirs are barred. These facts, as to the warranty, appeared in the pleadings, as in the plea and replication, and the decision was on the deft's. demurrer to the plt's. replication. Here Game claimed in fee, and was barred without assets ; but otherwise had he claimed in tail, by the statute *de donis*. Also

8 Co. 101,  
108, Sym's  
case.

**CH. 115.** Alice was barred, though the warranty descended upon her and her sister, the warranty covered the whole estate, and bound every part claimed against it, as it respected every one on whom it descended. The doctrine of implied warranty does not apply to lands. 1 Day's Ca. in Error, 156, Pollard v. Lyman.

**Art. 4.**  **Co. Lit. 384.** § 12. "The words, *grant, demise, &c.* in a conveyance of a chattel real, makes a warranty in law, or a covenant." "And warranty in law, as in partition, exchange, endowment by *dedi*, binds the heirs of the warrantor; but warranties in deeds do not unless they be named." "And express warranty extends neither to the heirs nor assigns of the feoffee, unless they be named." And if A grant or devise lands to B, he to pay rent, there is an implied warranty on account of the rent.

**Co. Lit. 385.** § 13. *Two or more warranties.* It seems to be a well settled rule, that "the assignee of a part of the land shall vouch as assignee; but an assignee of a part of the estate, as lessee or donee, shall not, but the lessee may pray in aid of the lessor."

**Co. Lit. 385.** § 14. If one make a joint feoffment with warranty, and the joint-tenants make partition by consent, the feoffor shall not be bound to warrant their divided estate."

**Co. Lit. 385,** § 15. "If two be enfeoffed with warranty to them, their heirs, and assigns, and one of them make a feoffment, the feoffee shall not vouch; but the other shall vouch for his moiety. And if there be two feoffors with warranty, and the feoffee release to one of them, yet he shall vouch the other for a moiety." And if two make a feoffment with warranty, and one die, the survivor and the heir of the deceased shall be vouched; and if both die, the heirs of both shall be vouched.

**Hob. 20,** § 16. So if land be granted to two jointly, and with warranty, and one makes a feoffment of his part, the warranty is lost as to him; but the other may vouch for a moiety; but if Roll v. Osborn.—**Co. Lit. 187.—3** they make partition, the warranty is lost as to both by the common law; but if they make partition pursuant to the statute of 31 and 32 H., the warranty remains, because they do it by compulsion; and Hob. 25, a warranty to joint-tenants and their assigns; their assignment must be joint. These cases must be on the ground, that to a joint estate only a joint warranty is annexed, which does not run with the divided part as in common cases.

**3 D. & E. 370.** § 17. *Heir's warranty living his ancestor,* bars the heir. As if the heir living his ancestor release with warranty, he is rebutted by it, and a warrantor, title or no title, cannot demand the land against his own warranty. The 4th of Ed. I., of Bigamis, provides, that the words, *give* and *grant*, shall not bind the heirs to warrant the estate; and this principle seems

**Co. Lit. 376.**

to be adopted in this State. And if the warrantor had no title when he sold, and acquires one by descent or purchase afterwards, yet he cannot claim against his warranty he has made to the warrantee or others in possession. CH. 115.  
Art. 4.

§ 18. In *gavelkind* lands all the heirs are vouched; and where heirs are vouched to warrant, the judgment shall be against them for their proportions only.

§ 19. Where the ancestor enters into a statute staple, and execution is extended on one heir, he shall have contribution against the others; and it is further said, where a recovery is against one heir on the warranty, he shall recover in contribution against the others. 3 Co. 13, 14,  
Herbert's  
case.

§ 20. When rights of action are bound, collateral rights of entry also are bound. 2 Salk. 685,  
Smith v. Tyn-  
dal.

§ 21. If one warrant to B, this is only for his life, for want of the word *heirs*, and though against the grantor and *his heirs*, but an exchange or partition implies a warranty to the party and his heirs; a warranty to A and his heirs is of course against all persons. Co. Lit.  
47, 384.—  
Cro. El. 602.

§ 22. "*More of the heir's warranty.* A man binds himself and his heirs in an obligation (in England) and hath heirs and lands on the part of his father and on the part of his mother, both heirs shall be equally charged." This principle is common law which establishes equality. 2 Co. 25.—  
11 H. VII. 20.  
—3 Co. 13,  
Herbert's  
case.

§ 23. "If an elder brother be tenant in tail male, remainder to the younger, and make a feoffment with warranty, and die, leaving a daughter, the younger is not barred, because the warranty does not descend on him," but upon the daughter, and therefore he may recover the land, and she may be liable to answer the value,—and no discontinuance of the younger's estate. 1 Inst. 376.

§ 24. If two men alien lands with warranty, the lands of one only shall not be rendered in value, but the charge shall be equal on them. For a joint lien which binds the lands shall not survive, or lie only on the survivor. As in case of a joint-warranty, where two for them and their heirs warrant lands to another and his heirs, the survivor shall not be only vouched, and though the sheriff cannot deliver the land of the one or the other at pleasure; for in executions which concern the realty and charge the lands, the sheriff cannot do execution on the land of one only." The heirs of two warrantors are equally charged. Hence when one warrantor dies, his heir is charged with the surviving warrantor (by English law.) And this is almost the only case of a contract made by two or more, and one dies, his representative is sued to answer with the surviving contractors. 3 Co. 14,  
Herbert's  
case.—Cro.  
Jam. 506,  
Michel's  
case.

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Art. 4.

2 Saund. 176,  
Walton v.  
Hele.

§ 25. *Wife's warranty and covenants.* In this case it was decided, that the warranty of husband and wife of an estate for years in a fine, binds her, though under coverture at the time, and on this warranty an action of covenant lies against her after his death. This was decided in covenant on a fine *sur concessit*, levied by *baron* and *feme* for ninety-nine years to the plt., if he so long lived, in which they warranted the lands to him against all men during the term; and as the *baron* and *feme* and his heirs warranted, it seems she had only dower or a jointure, and that it was not her estate; "for in all cases where a fine is levied by husband and wife of lands which are the estate of the wife, the warranty is from the husband and wife, and the heirs of the wife."

2 Saund. 180,  
Wms. Notes.  
Cro. Jam.  
563.

§ 26. "So if husband and wife, by indenture, make a lease for years of her lands, and she accepts rent after his death, she is liable to the covenants in the lease."

Greenwood  
v. Tyler, 2  
Saund. 180 a.

§ 27. So if a lease by indenture be made to husband and wife, and she agree to the lease after his death, she shall be liable to all the covenants in the indenture which run with the land, such as payment of rent, re-entry, increase of rent, *nomine pæne*, &c. which are reserved on the lease and dependent upon it, though she will not be subject to any collateral covenants, such as to pay a sum in gross, and other like covenants, which charge the person and not the land leased.

2 Saund.  
180 a.—7 D.  
& E. 478,  
Doe r.  
Willes.—  
Dyer, 91,  
146.—Cro.  
El. 656.—  
Cro. Jam.  
564.—2 Co.  
61, case of  
Wescot.—  
Savil, 400.

§ 28. So if husband and wife by indenture leased her lands for life, or years, rendering rent, and he died, and she accepted rent, held, she was bound by the lease at common law; for by her receiving rent after his death she affirmed the lease. So now she may affirm or avoid, after his death, a lease at common law, but the lease must be by deed; for her assent is necessary at the commencement of the lease, and that can only be by deed. But still, however, if the lessee or any other plead a demise by husband and wife, it is not necessary to plead it to be by deed, or that any rent was reserved. And a lease of *baron* and *feme* of her lands not pursuant to the statute of 32 H. VIII. c. 28, is a good lease of both, during the coverture, and may be pleaded as their lease, though it be without reservation of rent; for the lease is not void, as she after his death may affirm it, by bringing an action of waste, by accepting rent, &c. and so only voidable, and so may be pleaded.

3 Co. 27 b.

1 Bac. 302.—  
3 Bac. 306.—  
Cro. Jam.  
332, Jordan  
v. Wikes.

§ 29. But if she after his death disagree to the lease, it will be void as to her *ab initio*, and she may plead *non demiserunt*. So if he make a lease alone of her lands for years by indenture, it is valid for the whole term, unless she dissent to it by some act; for if she accepts rents that accrue after his death, the lease is thereby become absolute and unavoidable. But this is not so clear; and many authorities are, that her ac-

ceptance of rent after his death on his sole lease, does not bar her or affirm the lease; cited by Williams in his notes, 2 Saund. 180 b. 181. CH. 115. Art. 4.

§ 30. In this case it was held, the conveyance of the wife at common law is void; not because she wants skill or judgment, but because the law allows her no personal property, or income of her real estate, and the law supposes she acts under her husband's control. Nor can she sell any of her lands without his consent; and a warranty is his alone by the English common law, and by that law she cannot convey by deed; and is it not absurd to say she can give a warranty by deed, in a case where she has no legal capacity to give a deed itself of the land? 1 H. Bl. 331, Compton v. Collison.

§ 31. *The wife's acknowledgment of a deed.* In this case the court held, that if the husband and wife surrender the life estate of the wife to him in remainder, by deed executed by husband and wife, it is sufficient if the deed be acknowledged by the husband alone, and not by the wife. This has been our general practice in regard to her dower in the life time of the husband, but not in respect to her existing freehold or inheritance. 5 Mass. R. 438, Dudley v. Sumner.

§ 32. In this action the court decided, that a warranty entered into by husband and wife was his warranty only, and that the action on the covenant of warranty for damages was to be brought against the husband alone; but that his wife's deed operated to convey the land; and that she was "*estopped* by her covenants." On this case it may be observed, that as the wife legally conveyed her estate, it is clear she was *estopped* by her conveyance to reclaim it, and this she would have been if she and her husband had given only a quit-claim deed. But what force or effect could her covenants have as contracts, as she could make no binding contract. 7 Mass. R. 291, Colcord v. Swan & ux.

§ 33. Covenant broken on a warranty of land situated in Pennsylvania, in the Connecticut Susquehannah Purchase, made by a citizen of that State to a citizen of New York. Held to be binding, and that an action on it may be supported in Massachusetts:—the law of Pennsylvania prohibited the entry of a claimant under such title: breach assigned that the deft. had no title &c.: 1. Plea, *non est factum*: 2. Plea, special on *oyer* of the indenture, and that "the Connecticut Susquehannah Company," since the 1st of June 1780, were purchasers of a large tract, and title from it to the deft.; to the plea the plt. demurred and joinder: 3. In substance like the second, and demurrer. The deed was made in New York, and the deft. had no title but the pretended one of the said company, and under that title a statute of Pennsylvania of 1795 forbid any entry. Judgment for the plt. It will be observed 10 Mass. R. 267, Phelps v. Decker.

CH. 115. that action was on the contract between the original parties to it and so transitory, also between two citizens of other States.

Art. 4.

And though the deft's. deed might be void as a deed of conveyance of land in Pennsylvania by the statute of that State, if used there to recover the land ; yet it may be valid as a deed made to a citizen of New York domiciled there, and no party to that statute, and used by him as a personal and transitory instrument to recover back the consideration money or damages, for the breach of personal covenants in it. For any thing that appeared the plt. was ignorant of that statute, and so innocent, and his case is stronger in his favour than that of *Holman v. Johnson*, Ch. 9, a. 16 ; Ch. 1, a. 25. The individual States are mere corporations so far as they have submitted their territorial claims to the judiciary of the United States. 2 Johns. Cas. 417, *Woodworth & al. v. Jones & al.*

10 Mass. R.  
459, *Leland*  
*v. Stone.*

§ 34. *Warranty by mistake.* This was covenant broken for lands in Holliston : the plt. declared as to one acre, parcel of the premises and buildings thereon, the grantor was not seized &c. This acre the deft. had in 1799 conveyed to his son, by deed recorded 1805, and he had been in possession since 1799, and even before, and built on it. April 3, 1807, the deft. conveyed to the plt. with covenants of warranty including this acre, and the plt. knew of the son's possession. In the plt's. action on these covenants, held, he was entitled only to nominal damages, on the ground the parcel so conveyed to the son was inserted in the plt's. deed by mistake ; for neither grantor nor grantee viewed this acre as part of the premises conveyed, nor as part for which any part of the consideration was paid.

3 Johns. R.  
363, *Bennet*  
& al. *v. Irwin.*

§ 35. *Covenant for breach of covenant of seizin &c. contained in a deed.* Def't. pleaded : 1. "That the plt. after the deed to him, in consideration of \$1000, sold, released, and quit-claimed all his right and title to the land to the deft." &c. : 2. "That before the plt. sustained damage by a breach of the covenants in the deed to him, he sold and released all his right, title, and interest in the land to the deft.:" 3. "That in consideration of \$1000 paid to him, the plt. agreed to give up the deed to the deft." Plt. demurred to the first and third pleas, and replied to the second plea, that the plt. had sustained damages before the release, by reason of the breach of the covenant of seizin, to wit : by paying to the deft. \$1408 for the land when the deft. was not in fact seized &c., and tendered issue thereon ; to this replication the deft. demurred specially. Held, that the subsequent re-conveyance of the land to the deft. was not an extinguishment of the covenants in the deed to the plt. : that the first and third pleas were bad ; and though the replication to the second plea was bad, yet the

plt. was entitled to judgment on the demurrer. The re-conveyance was no release of the covenant. CH. 115.  
Art. 5.

§ 36. In all these cases of covenants the parties must go to trial on their rights, as they stand at the time of the action brought; hence the deft. is not allowed to shew a title acquired after sued. And if title to part only fails, the covenantee cannot rescind the whole and sue accordingly; but must sue on the covenant, and recover damages in proportion to the value of the part, as to which title fails, and this value will be for quantity and quality: and if a covenant of seizin and good right &c., then the general measure of damages is the consideration money and interest. 5 Johns. R.  
49, Morris v.  
Phelps.—  
4 East, 507.

ART. 5. *Principles of recoveries generally.* § 1. Though the principles of the foregoing cases are useful, they must be adopted here with some caution, as our statute laws establish some new principles. Ch. 178, a.  
23, s. 3.

§ 2. By our law, the whole estate of the warrantor or covenantor, real and personal, is assets in the hands of the executor or administrator. Hence he is held to warrant and defend to the full value of the estate of the covenantor, if the damages recovered on the breach of his covenant amount to so much. By Massachusetts act of March 4, 1784, sect. 7, &c. his estate, real and personal, is liable for his debts on judgments against his executors and administrators, and among these debts and contracts a covenant of seizin, of right, of warranty, and as to incumbrances and further assurance is included. Ch. 129, a. 3,  
s. 1, 2.—Ch.  
223, a. 1 to  
17, cases.—  
Ch. 185, a. 5,  
s. 5, &c.—  
Ch. 114, a.  
19.—  
Proceedings  
and forms in,  
at large, 10  
Wentw. 183,  
&c. 251, &c.

§ 3. The warranty can, with us, amount only to a covenant that the grantor is seized in fee, and that he has good right to sell; for if he is seized in fee and has good right to sell, there can be no defect in the title of the grantee." Though this clause is generally true, it is not perfectly correct; for even a disseizor may be seized in fee, and have good right to sell, that is, power to convey, and yet have no title to convey to his grantee, as will appear in subsequent chapters. Sullivan,  
318.

§ 4. The warrantor, or his heirs, executors, or administrators ought to be vouched in, so that they may have an opportunity to defend their title and to prevent an eviction of the warrantee. Sullivan, 318,  
330.

§ 5. Executors and administrators are bound to warrant as far as they have assets, though not named: and if one covenant he is seized &c. and bind not his heirs, yet his executors and administrators are bound; and his heirs and devisees on the statute after three years. This act provides, that when certain demands against the estate of any person deceased arise by virtue of any "covenant, contract, or agreement," that could not be claimed till after the term of three years, Statute, Feb.  
14, 1789,  
sect. 5.

CH. 115. (such covenant, contract, or agreement, not being in full force during that time) the claimant in such case may have his remedy against those who inherit the estate of such person or devisees thereof, against whom the demand lies, if such claim be made within one year from the time of its becoming due, and not against the executor or administrator."

Art. 5.



§ 6. The foregoing principles of the English law in relation to warranties and covenants real, so far as they are principles of covenants and contracts, and generally principles adopted in our warranties and practice in regard to them. The material difference between our, and the English law on this subject, is in regard to the remedy on warranties, the form of the action, and the nature and quantity of the compensation for breach of warranty or covenant.

Common  
recovery.

Porter v.  
Whittemore,  
Mass. Essex.

§ 7. In one case, however, we have strictly followed the English practice and remedy, that is, in the case of common recoveries. In this case the demandant has brought his writ of entry *sur disseizin* in the post against the tenant, and he has come and defended his right and vouched his warrantor, and he present in court in his proper person, has freely warranted the tenements demanded to the warrantee, and prayed the demandant might count against him, the warrantor, then he has demanded against him tenant by his own warranty the premises in the same form, and thereupon has alleged that he himself was seized thereof with the appurtenances in his *demesne*, as of fee and right in a time of peace &c. within thirty years last past, taking the profits thereof &c., and in which the said (warrantor) hath not entry but after the disseizin which one — made unjustly, and without judgment to the demandant within that time, and whereof the said — deforceth the demandant, and the warrantor, tenant by his own warranty hath defended his right &c., and further vouched to warranty a second vouchee, usually some pauper, and he present in court in person, has freely warranted, &c. prayed the demandant might count against him, this he has done, and then the second vouchee has defended his right and alleged that the said — did not disseize the demandant &c., then the demandant has imparled, for four days usually, and this day has been given to the parties &c. ; on this the demandant has appeared, and the second vouchee has made default, and judgment, the demandant recover the premises of —, and he recover in value over of the last vouchee &c. in the English form.

§ 8. As the people of Massachusetts from their earliest settlement here, have adopted fully the English principles and practice in regard to these common recoveries, the vouchers to warranty, and the entering into the same therein, and as to

estates in tail generally, they must have adopted the English principles of warranty and real covenants in regard to this kind of estates. CH. 115.  
Art. 5.

§ 9. This was an action of *formedon*, and the court held, that *non devisavit* is a special issue: 2. That part of an indenture to lead the uses of a common recovery executed by the recoveror, being acknowledged and recorded, it is not necessary the part signed and sealed by the recoveree should be acknowledged and recorded, (the wife's acknowledgment, see post.) The court was not unanimous; Sedgwick thought that Dudley, from whom the estate passed, ought to have acknowledged the deed. 5 Mass. R.  
438, Dudley  
v. Sumner.

§ 10. *Principles of recoveries—English cases.* Though recoveries are now but little used in the United States, yet they were in the time of the Colonies and Provinces used to a very considerable extent, and often in tracing back our titles to real estates we find them depending in several cases on the principles of common recoveries, suffered in the Colonies while subject to Great Britain. Therefore, in several cases in our claims and conveyances of real estates we find it necessary to attend to the principles of these recoveries, always a species of conveyances; to examine and consider on what principles and in what forms they were suffered, in order to ascertain if the conveyance at the time in this form was valid; if it was, we pursue the title accordingly in one direction; if not valid, we must pursue in a different manner. At common law, all inheritances were fee simple absolute, fee simple conditional, or qualified fee; the donor had only a possibility of having the lands again. Before the statute *de donis* the tenant of the lands entailed had only a fee simple conditional. If before issue had, he made a feoffment in fee, the donor should not have entered for the forfeiture, but this feoffment had barred the future issue; and after issue had, the condition was performed to this purpose, that he might have aliened, and thereby have barred the donor and his heirs from all possibility of reversion for default of issue, and as to the heirs of his body, he might have barred them as well before issue had as after. This statute only took away this power of alienation, and indirectly this power was restored in time in the mode and manner of common recoveries both as to the issue and remainders. 2 Bl. Com.  
Append. No.  
5; also 357.  
—2 Saund.  
89, 42.—  
Willes, 451.  
—3 East, 346.

If an estate be made to A and his wife for life, remainder to the heirs males of A on the wife begotten; A cannot by common recovery dock this estate during the wife's life; see 6. A recovery in which the tenant in tail is vouched, and vouches jointly with another person, bars the entail. In some cases an infant may suffer a common recovery: (2 Salk. 567, Lloyd 2 Salk. 567,  
Franklin v.  
Clithero.—  
2 Ld. Raym.  
753, Jen-  
nings v. Ro-  
gers.

CH. 115. *v. Evelyn*,) and in which the tenant to the *præcipe* may be made by fine; and if it be reversed, yet the recovery is good, Art. 5.

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 1 D. & E. 738,
 745, *Smith v. Clyfford*.
 But a recovery cannot be suffered by tenant for years and tenant for life in remainder, with remainders to the first and other sons of tenant for life in tail, remainder to tenant for life in tail, though tenant for years and for life join in a lease and release to make a tenant to the *præcipe* and then suffer the recovery; thereby the estates in tail limited to the sons is not divested, nor is there any forfeiture of the respective estates of tenants for years and for life. But by such a recovery the tenant for life only bars his after remainder in tail, subsequent to the remainder to the sons. It was urged, that tenant for life by suffering a recovery forfeited his estate for life, and cited Co. L. 336. But the court thought that this authority applied only to a bare tenant for life, and not where he has also an estate in tail, though remote as in this case. This was all he sought to bar, as he might well do, and his remainder was a legal subject for the recovery to operate upon, and as to this he entered into warranty. And it is a settled principle in suffering a recovery the tenant to the *præcipe* must have a freehold in possession, and if not, a recovery suffered by him is invalid. The recovery must pass the freehold and from him who has it.

6 D. & E. 708,
Roe v. Wigg.

6 D. & E. 107,
 in notes,
Roe v. Baldwin, Martin v. Strachan.

The effect of a common recovery is to pass an absolute fee by tenant in tail. Before the statute *de donis* he had a fee conditional, that is, a fee simple on condition he had issue; and the nature of his estate is the same still, and the effect of the act was only to take away the power of alienation; and before this statute the remainders and reversions were called *possibilities*; since called *remainders* and *reversions*. But as common recoveries have been since the statute introduced, they take the place of the alienations before it; hence even now remainders and reversions on estates in tail are but possibilities in fact, for it is always in the power of the tenant in tail in possession, or of one in remainder with consent of the tenant of the freehold in possession, so that he or they can constitute a tenant to the *præcipe*, a tenant of the freehold in possession, to dock his estate in tail by a recovery, and thereby destroy or defeat entirely all the remainders and reversions thereon, thereby making them mere possibilities,—yet such as may be sold and conveyed; that is, vested, subject however to be divested by the recovery. And recoveries convey the lands subject to all the incumbrances made by tenant in tail in possession, but not subject to those made by those in remainder or reversion, which shews that nothing passes from these

in remainder &c., but all from the tenant in tail, and he passes by the recovery an absolute fee simple. See Wynne v. Thomas, Selwin v. Selwin, Goodtitle v. Chandos; also Ch. 129, a. 3; Ch. 185, a. 5; Roe v. Griffith, Hawley v. Northampton, Dudley v. Sumner. CH. 115.
Art. 5.

§ 11. *Recoveries*. In suffering them the court will not enlarge the return of the writ of summons so as to make a term intervene between the teste and return. What is a sufficient description in a common recovery. Cowp. 346. 2 W. Bl. 1201,
Barnard v.
Woodcock &
al., 1223.

§ 12. Recovery good though the tenant to the *præcipe* had no freehold at the time of the writ, so long as it is conveyed to him before judgment: 2. If a tenant in a real action have no estate in the land at the time of the writ, yet if he afterward acquires one by his own act, he shall not plead *non-tenure* in abatement: but 3. He may if the estate come to him by act of law. And good if he gains the freehold by his own act at any time before judgment. A writ of entry was brought against Miles Corbet, and he appeared, and the demandant counted against him, and he vouched Lacy, the tenant in tail, and a summons *ad warrantizandum* issued, &c. And after the teste of the writ of summons, and before the return of it, Lacy, the tenant in tail, conveyed to Miles Corbet by lease and release for life. At the return of the summons Lacy appeared and entered into the warranty, and vouched over the common vouchee, and so a recovery was had. Objected, Corbet was not a good tenant to the *præcipe* at the return of the writ of entry. The party who objected, agreed it had been good if he had purchased before the return of the writ of entry; but not after, to bind strangers or the issue in tail, though it might be good between the parties by way of *estoppel*. But held, it is not enough the counterplea of voucher say the voucher had nothing in the lands at the time of the voucher without *nec unquam postea*; and so it is of *non-tenure*. Enough the tenant to the *præcipe* gains a freehold before judgment, for then it cannot be said to be a recovery against him that has nothing. Judgment affirmed. 2 Salk. 568,
Lacy v. Will-
iams in error.

§ 13. A recovery cannot bar a condition that runs with the land, but may a condition collateral: 2. Tenant in tail and he in remainder may be vouched jointly: 3. To A and the heirs of her body, by one of the name of Searle, is an estate tail: 4. Words sounding conditionally taken as a limitation. One Isaac Savery was made, by fine, tenant to the *præcipe*. Held, A's estate was a good estate in tail of the middle sort, not the highest, nor the least; for it might have been to her and the heirs of her body begotten by John Searle, which had been more particular, or it might have been general, the heirs of her body by any husband; however this middle kind is with- 2 Salk. 570,
Page v. Hay-
ward.

CH. 115. in the reason of the statute *de donis*: 2. The words, *upon condition* &c., though express words of condition, shall be taken to be a limitation; 1 Vent. 199, 202; and Holt said, he saw no reason why they might not be so construed in a deed, though the law had not been carried so far; and the meaning is, if A at her death have no issue by a Searle, the estate is to remain over: 3. A's estate did not cease by marrying one not a Searle, for the remainder over is in default of both conditions; and she may survive the first husband and marry a Searle; and so there is a possibility as long as she lives: 4. If the estate had been to A and the heirs males of her body by a Searle, to be begotten, provided and upon condition if she do marry any but a Searle, that then it shall remain to J. S. and his heirs; a common recovery suffered before marriage would have barred the estate tail and remainder; and if she had afterwards married with one not a Searle, the recovery would not have been avoided: 5. If the donor reserve a rent with a condition to re-enter, a recovery will not bar it, it is a condition that runs with the land; but otherwise if it be to reenter for the non-payment of a sum in gross: 6. If tenant to the *præcipe* vouch tenant in tail in possession and him in remainder jointly, and they jointly vouch over the common vouchee, this is good, though it may be more regular to vouch in succession, that the recovery in value may not be joint but enure severally: 7. In an adversary action a *præcipe* is brought against several, it is sufficient one hath the tenancy of the land; and if he will plead, he is sole tenant, and traverse the others have any thing, this the demandant may admit, and proceed as to him, and the writ shall abate only as to the rest; also the others may disclaim: 8. As joining a stranger with a tenant does no hurt, so joining a stranger with a vouchee does no hurt, for he is but in *loco tenentis*, a tenant by the warranty: 9. If the tenant to the *præcipe* vouch a stranger, who vouches tenant in tail, and he enters into warranty, it is good, having also vouched the common vouchee; for his being a stranger is not material, for in judgment of law he is become tenant by the voucher to the *præcipe*, and a release to him is good, and the voucher is good whether there be a real warranty or not: 10. At common law if a stranger was vouched, the demandant could not counterplead it, by West. 1, c. 40, he may, if he be absent, counterplead the voucher, namely, that the voucher and his ancestors never had any thing in the land, but not if he be present: 11. Tenant in tail coming in as vouchee comes in in privy of all estates he ever had. Pleadings in, see Ch. 178; form of pleading a recovery, 2 Ch. on P. 224.

§ 14. It is well settled, that to make a recovery good it

must be against the perfect tenant in tail, and he also seized by force of the tail; and then if suffered by such in possession, it not only devests and displaces the estate tail, but all remainder and reversions depending thereon; but also, by reason of the supposed recompense, bars them forever, 5 Bac. Abr. Am. ed. 837, against such, that the supposed recompense may pass to him and his issue, and to all, as the estate itself would have passed if no recovery had been suffered. 3 Co. 6; Moor, 210, Owen v. Morgan. And if it cannot so pass, the recovery bars but the parties to it; as where baron and feme are jointly seized in tail, and the recovery is against him alone, for the recompense in value cannot enure to him in remainder on their joint-estate, and not to a moiety, for he has none with his wife. Plow. 8; 8 Co. 77; 3 Co. 6; Co. L. 347; Co. L. 332; 10 Co. 95; Cro. El. 68.

ART. 6. *Covenant of seizin.*

§ 1. The grantor in our deed, usually covenants that he is seized, or that he is lawfully seized in fee of the premises; in this respect he asserts or declares a fact to be true. He covenants *it is true*, and if not so, then he covenants a fact is true that is not true, and that he had a seizin, which at the time he had not. And so his covenant is broken the moment it is made; and thereby a right of action, and to damages, immediately accrues to and vests in the grantee; and this right to pecuniary damages become a personal right, and if he dies passes to his personal representatives, as to his executor or administrator, and not to his heirs, his representatives only as to his freehold and inheritance. This covenant, thus broken, never runs with the land, as has been already stated; as no covenant after broken can run with the land or estate; because whenever broken the covenantee's right and claim is only to money damages for the breach; and these, being a mere *chase in action*, never pass with the land, nor can they be assigned. And so has been our practice, as the heirs have never been sued, it is believed, in this State on a breach of this covenant, (except after the three years;) but the executor or administrator. And in assigning a breach of this covenant, it is sufficient to negative its words, and allege that the grantor "was not seized in fee," or "that he was not lawfully seized in fee," as the deed may be worded. The damages have usually been considered to be the consideration money paid for the land by the grantee, and interest, according to a number of cases recited in a subsequent article. But in fact two points in this respect remain unsettled: 1. If the grantor covenant he "is seized in fee," and the issue be thereon, and he proves seizin in fact even by disseizin, he maintains the issue; but if he covenant he "is lawfully seized in fee," and is

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Sec Ch. 116, a 8, s. 2.—Shep. Touch. 170, covenant.—Cro. El. 863.—3 Com. D. Cov. B. 3.—Leonard, 31.—3 Wood's Con. 539, 551, 563, 960.—Cro. Jam. 303.—Jones, 195.—Hob. 12, 23.—5 Co. 71.—F. N. B. 112.—Cro. El. 369.—2 Saund. 181 b.—2 Johns. R. 1; & 4 Johns. R. 72.—Am. Prec. 260, 267.—4 Cranch, 420, 438, 421.—9 Co. 60.—Cro. Jam. 304.—7 Johns. R. 376, 381.—4 Dall. 436.—Covenant, breach of seizin; the covenantee had received the mesne profits 15 years: held, he could recover only the consideration money 106, a. 2, s. 14.

CH. 115. sue be thereon, it is essential he, to maintain the issue, prove
 Art. 6. he was lawfully seized; and if seized only by disseizin and wrong, the jury cannot, on this issue, find he was lawfully seized: 2. In respect to the amount of damages, if the grantee has been turned out of and lost the land, there is no question but that the said consideration and interest is the true amount; but if he remains in possession of the land and has not been ousted or evicted, it is an important question if he shall recover his said consideration money and interest, while he so retains the land. These questions will be examined.

For many years it seemed to be entirely settled, that the covenant of seizin once broken could no longer run with the land, and in England as well as in America.

4 Maule &
 Sel. 63, A. D.
 1816, King-
 don v. Nottle.

§ 2. However it may be observed in a late case in England the covenant of seizin was held to be a continuing covenant that run with the land after broken, if not sued before the land was conveyed by the covenantee; and therefore that the devisee of the covenantee can have covenant for the breach of it. It seems by the pleadings that the deft's. counsel understood the law to be as above stated, to wit, that a covenant broken cannot be assigned. He cited Shep. Touch. 170; 2 Lev. 26, Lucy v. Levington, cited above, Ch. 106, a. 2, s. 3; also Vent. 175; Lewes v. Ridge, Cro. Car. 863; also 5 Taun. 418. No argument is reported for the plt.

King v. Jones,
 6 Taun. 418.
 —1 Marsh.
 107.

Lord Ellenborough C. J. noticed Kingdon v. Nottles, 1 Maule & S. 355; and Chamberlain v. Williamson, 2 Maule & S. 408; and said, that the executor of the covenantee "could only recover in respect of such breach as was a damage to the personal estate;" [was a breach of a promise of marriage and no special damages alleged.] But here, said Lord Ellenborough, the covenant passes with the land to the devisee, and has been broken in his time; "for so long as the deft. has not a good title, there is a continuing breach." "It is in the nature of a covenant to do a thing, *toties quoties*, as the exigency of the case may require." "Here, according to the letter, there was a breach in the testator's life time, but according to the spirit the substantial breach is in the time of the devisee of the estate." Judgment for the devisee, who in his declaration stated the covenant of seizin and right, the covenantee's devise of the estate to her &c., her entry &c., that the deft. was not seized &c., by reason whereof the premises were of much less value, to wit, £2000 to the plt., than otherwise they would be &c., to which there was a special demurrer. The court cited no authorities on the main point.

4 Maule & S.
 R. 188.

Greenby & al.
 v. Wilcocks.

§ 3. The law of New York on the above point is the same as that of Massachusetts. As 1 Johns. R. 1, 8; 4 Johns. R. 72. But Livingston held, this covenant of seizin could pass

after broken with the land, 2 Johns. R. 5, 8, to the fair purchaser, and said in the case in Cro. El. 863, the purchaser knew he bought a *chose in action* &c., hence not to be favoured. But Livingston J. went on the words of the covenant, by which the covenantor covenanted with the covenantee, his heirs and assigns, and on the general principle favoured in modern practice allowing a *chose in action* to be assigned in equity. But the other judges held, the covenant of seizin was broken as soon as made, and became a *chose in action* that could not be assigned.

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Art. 6.

Ch. 116, a. 3,
s. 2.

§ 4. All the judges, in this case, held for breach of this covenant of seizin, the measure of damages is the consideration money and interest, not including improvements, as stated Ch. 116, a. 3, s. 2. Also all but Spencer J. held, that where this covenant and the covenant of quiet enjoyment are in the same deed, and both broken, the first for want of title, and the last by eviction, the measure of damages is still the same, and that the covenant of quiet enjoyment is in such case subordinate to the covenant of seizin, and involved in it: but Spencer J. held it was distinct; and as on the covenant of seizin broken, the plt. could recover the consideration money and interest, so on the covenant of quiet enjoyment, he could also recover the value of the improvements actually made, but not increase of value by mere appreciation. This distinction the other judges denied, as also the recovery for such improvements; but also all seem to agree that both points were new in England and in the United States. This covenant for quiet enjoyment, as to which the plt. was evicted, led the judges, in this case, Pitcher v. Livingston, to observe on the covenant of warranty, and the measure of damages for the breach of it, and all, but Spencer, seemed to hold the consideration paid and interest were this measure, and that the modern covenant of warranty is in the place of the ancient. And Van Ness J. said, "in suits upon the ancient covenant of warranty, beyond all dispute, the recovery was restricted to the value of the land at the time of making the covenant," and that this rule inflexibly continues. In this Kent C. J., Thompson, and Yates J. concurred. Cited Year-book 30 Ed. III. 14 b; Year-book 19 H. VI. 46 a, & 61 a; also Fitzherbert, Brooke, and Rolle; also Ballet v. Ballet, Godb. 151.

4 Johns. R. 1
to 23, Pitcher
v. Livingston.

§ 5. Held, if the grantee have a covenant against the grantor of seizin in his deed, and there being a failure of title, the covenant is broken as soon as made, and if the grantee die, the right of action goes to his executor or administrators, and not to his heirs; the covenant is not connected with the

4 Johns. R.
72, Hamilton
v. Wilson.

CH. 115. estate, for, as no estate passed by the deed to the ancestor,
 Art. 7. none descended to his heirs.

ART. 7. *Covenant of right.*

8 Wood's
 Con. 553.—2
 Mass. R. 456,
 Beckford v.
 Page; Pol-
 lard v.
 Dwight.

§ 1. The grantor in our deed also covenants, "that he has good right to convey." In this also he asserts or declares a fact to be true. He covenants he has a right to convey, and if he has not, then his covenant is broken the moment it is made; and thereby a right of action and to damages, immediately accrues to and vests in the grantee, and this right becomes personal, and the reasoning as to the covenant of seizin above applies. And in assigning the breach of covenant in this, as in the other case, the general rule applies, "that breach may be assigned by negating the words of the covenant;" as that he was not lawfully seized, or that he had good right to convey. And seizin in fee, and good right to convey the land, is the same thing in substance. No eviction need be assigned. 4 Cranch, 429, 430. Nor is parol testimony admissible to prove prior claims on the land.

2 Mass. R.
 456, Beckford
 v. Page.

§ 2. And in this case it was decided, that "if one grant land, and by his deed covenant that he has good right to convey, when in fact he has no such right, such covenant is broken immediately on the execution of the deed, such a covenant does not pass with the land to the assignee." "And the measure of damages for the breach of such a covenant is the consideration paid with interest thereon."

2 Mass. R.
 433, Marston
 v. Hobbs.—
 Kirby, 3.—4
 Cranch, 421.
 1 Penn. 410.
 —1 Bay, 256.
 —4 Dall. 436
 to 446; val-
 ue at the
 time of the
 sale, 441.

§ 3. This rule, as to damages, applies precisely as in the breach of the covenant of seizin. And when the grantor has no right to convey, his deed passes no estate to the grantee, and then he can lose none, but his loss is his consideration paid and interest. But the material question is, when has the grantor a right to convey, or what is the same thing, when has he a power to convey. According to the cases stated in chapters 104, and 109, above, the grantor has this right or power to convey when he has seizin of the estate or possession claiming title to it, as Ch. 104, a. 3, *Twambly v. Henley*, where the grantor covenanted he had full power, good right, and lawful authority to sell the land." And the court held, that this covenant was "not broken if he was in fact seized, either by wrong or of a defeasible title," for being so seized he had legal power to convey, and power to convey was good right, or lawful authority to convey. And the same principle is laid down in the case, Ch. 104, a. 3; as that "one in possession of land, claiming to hold it in fee simple, is sufficiently seized to enable him to convey;" and many other cases in those chapters. Hence there is no breach of this covenant of right, or good right to convey, if the grantor when he makes his deed has seizin or possession in fact,

Twambly v.
Henley.
Bearce v.
Jackson,
admr.—2
Wheaton, 46,
Duval v.
Craig.

claiming title in fee; but if he has not this seizin or possession, then his covenant is instantly broken, and the covenantee has immediately a right of action, and to damages, but whether to more than nominal damages is a point to be considered presently.

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§ 4. This was an action of covenant broken, on a deed of Andrew Oliver and Mary his wife, and William Walter and Lydia his wife, all deceased, but Walter survived Oliver. Deed was executed September 29, 1792, and was of land in Deering in New Hampshire, consideration \$18.67. Plt. stated that said Andrew and William "covenanted with him, his heirs and assigns, that they and their wives in their rights, were lawful owners of the premises; that they had full right to sell and convey the same to the plt. in fee simple, and that they would warrant the same to him and his heirs against all lawful claims." Plt. assigned a breach by stating "the grantors had right to be seized of the premises, but had no right of entry thereunto; and so had no right to sell and convey the same to the plt. in fee simple; plt. stated his sale and warranty to Ebenezer Newman, September 3, 1793, and his eviction and his recovery of \$555.49 damages and costs against the plt. who sold for \$133.33. The court held, the rule to be in an action on a covenant of seizin the plt. must recover only the money paid for the land and interest; that this rule applies to actions brought on conveyances of land in other States, as well as in this; "the covenants were broken when the deed was executed." In this case when the plt. sued, his grantee had been evicted, and so the consideration money paid and interest were the true amount of damages.

8 Mass. R. 243, Nichols v. Walter &amp; al. exrs. of Walter.

§ 5. *Two covenants in a deed construed together.* As where A covenanted generally he was well seized &c.; also warranted the premises to the grantee &c. against all, except the lord of the soil; held, the last limited the first.

2 Johns. Ca. 203, Cole v. Howes.

#### ART. 8. *Covenant of warranty.*

§ 1. This covenant looks forward, and in it the grantor covenants that he will warrant and defend the granted premises, and every part thereof, and that if the grantee shall be evicted by title paramount, the grantor will indemnify him and make good his loss occasioned by such title. This covenant is, if the grantee be evicted by title, and therefore he must be so evicted or expelled before there can be any breach of this covenant, and consequently before any right of action can accrue: and on eviction the right to damages vests, and the damages accrue, and the covenantee becomes entitled to his action, then the amount of damages can be ascertained, and those then sustained are the true damages. Same rule in Connecticut and South Carolina, Kirby, 3; Bay, 19; but the

11 Mass. R. 464, Emerson v. Minot Proprietors.—Chipman, 68.—3 Caines' R. 111.

CH. 115. value of the estate at the time of the warranty made in New York, 3 Cain. 111 ; 4 Johns. R. 123 ; in Pennsylvania, 4 Dallas, 441 ; and in Virginia, 1 Hen. & Mun. 201 ; 2 Do. 164 : as to Massachusetts, see the cases.

3 Mass. R. 523, Gore v. Brazer.—  
4 Hall's Law Journal, 129.

§ 2. Hence our Supreme Judicial Court laid down the rule in this case, that "in an action upon covenant of warranty of lands, the measure of damages is the value of the lands at the time of eviction," and this value the warrantee loses.

2 Mass. R. 433, Marston v. Hobbs.

§ 3. And that our "immemorial usage has been to recover damages in a personal action of covenant on the warranty," which has also been used in England in addition to other methods never used here, as a writ of warranty of charters, binding the land of the warrantor from the date of the writ, and giving an execution on actual eviction for other lands in value, and voucher and recovery over in value. And as the grantee has no injury on this covenant, until he is ousted or evicted, he must shew an ouster and how he is evicted, on two principles : 1. When he shews a things done, he must generally shew how done : 2. As the grantor "is not bound by his general warranty to warrant against all claims and ousters, this covenant comes within the exception" to the general rule, "that the plt. may not assign the breaches generally, by negating the words of the covenant." He "must assign a breach by shewing an ouster by an elder title." In this case it does not appear what the issue was precisely, whether the covenant was, that the grantor was seized, or that he was lawfully seized, and so it does not appear if the issue was on the grantor's bare seizin, which might be by right or by wrong, or on his lawful seizin. Hence it is difficult to understand the court, when it is said, that it was not necessary for the deft. to maintain his issue "to shew a seizin under an indefeasible title." "A seizin in fact was sufficient, whether he gained it by his own disseizin, or whether he was in under a disseizor ; if at the time he executed the deed he had the exclusive possession of the premises, claiming the same in fee simple by a title adverse to the owner, he was seized in fee and had a right to convey." Can it be understood the court intended that the grantor's seizin gained by his disseizin could maintain his allegation in his deed, that he was lawfully seized ? Though he might have "a right to convey." Lawful seizin and a right or power to convey are very different.

4 Mass. R. 349, Hamilton v. Cutts & al. exrs.

§ 4. In this action of covenant broken the plt. stated, that one Moore was lawfully seized in fee of part of the land, and that one M'Crealis under his title entered and evicted the plt. of that part. The deft. traversed the eviction. Verdict for the plt. ; he voluntary gave up the possession, and the court held, this he might do, if the party claiming had a good title ;

but he consents at his peril : " and in a suit against the warrantor the burden of proof will be on the plt.," the warrantee, or covenantee ; though otherwise in case of eviction on judgment with notice of the suit to the warrantor, as the judgment is evidence. According to this case if no judgment, the covenantee must prove the covenantor had no title, or, what is the same in substance, an elder and better title in third persons. The reason seems to be this, the warrantor is seized in fact when he conveys, and this seizin is *primâ facie* evidence of title, and makes the person so actually seized or possessed, claiming title in fee, *primâ facie*, at least, tenant of the land to feudal purposes, and this seizin enabled him to convey by livery of seizin, as he who had the actual seizin could always make livery of seizin and so pass the land. And when our statute anciently provided, that he who had good right and lawful authority to convey, might by his deed in fact convey, it was construed by the courts of law to mean thereby, this seizin which gave a capacity to convey ; though it might at the time of passing the statute be doubted if those who passed it meant this, or that a disseizor had this right and authority. A distinguished judge says, " as to the covenants of ownership, lawful seizin, possession, and lawful authority to grant and convey, they are all of the same import." These covenants are broken as soon as made, *Shep.* 166, 167 ; still the purchaser under certain circumstances may hold the land, and courts may before they call on the seller to make out an indefeasible title, require evidence from the purchaser that some other person had, and hath a subsisting title. If no such evidence is produced, if the seller was actually seized at the time of conveying, and the purchaser has quietly enjoyed ever since, especially for such a period as bars all claims, I see no objection to find the issue for the deft. It is *primâ facie* evidence of title. " If A enter into a contract to convey certain lands to B, this is an undertaking to convey by a good title. 1 H. Bl. 280. When the deed is made and contains covenants of lawful seizin, good right to convey, &c. the meaning is, that the seller has good title. But a title which has proved good, and which cannot be defeated, may be found by a jury to be good, though not originally indefeasible and perfect. When the purchaser, as in England, examines the seller's title, and where the seller seldom covenants in freehold estates against any thing but his own acts, courts certainly would feel justified in saying the title is good when the seller was seized, unless it was made to appear that there was a good subsisting title in another." It is clearly right to say, that when the seller's deed " contains covenants of lawful seizin, good right to convey, &c. the meaning is, that

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the seller has good title." This is the plain import of the words, and no decision is found to the contrary. But still, if there be such covenants of lawful seizin, and the covenantor had no title but a bare seizin by wrong, yet if the grantee remains in quiet enjoyment and possession, and not evicted of the land, it may be a question if there be any breach of covenant that will entitle him to real damages, or to any but nominal damages. This amount of damages will be considered presently. On the whole, it is absurd to say the grantor's words, *lawfully seized*, are complied with by proving his tortious seizin.

F. N. B. 315.  
4 Ed. II. 29.  
2 H. VII. 31.

§ 5. If in cases of warranties a man have divers warranties against divers men, he may recover against them severally in several actions; on the same principle he may in England have divers writs of warranty of charters against them, and so recover; for they are several and distinct covenants, but he can have but one full satisfaction; and in England on this writ if the deft. have no lands, the plt. may recover damages; for it is a personal action in the nature of a covenant. This certainly is reasonable, though some books are otherwise. It is an action grounded on a breach of covenant, and often to no purpose, if damages cannot be recovered in it; for often the deft. may have no lands when this writ is sued out or afterwards.

7 Mass. R.  
444, *Niles v.*  
*Sawtell.*

§ 6. In covenant of warranty, sued by one who had sold or assigned his interest in the land to another, held the declaration must state the plt. is answerable to the assignee, for if not, having sold the land, he sustains no damages but by being so answerable.

8 Mass. R.  
262, *Harris &*  
*al. v. Newell.*  
See also *Fol-*  
*liard v. Wal-*  
*lace*, Ch.  
101, a. 3, s. 27.  
—7 Johns. R.  
258.—  
11 Johns. R.  
122.

§ 7. This was an action of covenant broken, and the court held, that the covenantee in covenant on warranty in a conveyance is entitled to nothing beyond the consideration paid and interest, until after eviction. This action was brought by the assignees of the grantee on the usual covenants; breach, never seized in fee, nor ever had a right to convey the premises, and "that they were incumbered by a right to be seized thereof in fee, which was then vested in the heirs of one Thomas Maudlin then deceased; and that the said Newell had not warranted and defended the said premises to the plts.;" that one of said heirs sued for a tenth part in an action pending, against which the plts. had no defence. Plts. claimed the value of the premises, deducting the value of their improvements, which they could recover against the right owner by statute of 1807, c. 74, sect. 3, (Betterment act.) But the court said, as there had been no eviction, the covenants must be considered as broken as soon as made, and damages as above.

3 Wood's  
Con. 567,  
570.

ART. 9. *Covenants as to incumbrances.*

§ 1. What are incumbrances? The grantor usually cove-

nants, that the granted premises "are free of all incumbrances." In this case also, the grantor covenants that the fact is true, that no incumbrances exist on the land; but not that none shall afterwards arise and exist; and if there be incumbrances when he conveys, his covenant is immediately broken, and a right of action accrues to the grantee. And the above reasoning applies, except in assigning a breach, for in this case, as in warranty and eviction, it is not enough merely to negative the words, and to say the premises were not free of incumbrances, for such a general assignment does not amount to a breach, and such a breach must be especially assigned, for the substance of the plts., the grantee's charge is, that the premises were under incumbrances and not free of them, and then, according to a general rule in pleading, he must shew how incumbered. In this case an estate may pass to the grantee, though incumbered, as by a way, dower, &c.; hence the loss to the grantee is not scarcely in any case the consideration money paid, or any ascertainable part of it, but damages equal to the incumbrances. Therefore, the incumbrances themselves must be the measure of damages. As the grantor does not covenant against all possible incumbrances, the breach of his covenant must be especially stated in order to shew the nature of the incumbrance, as well as how it exists. If A contract to sell his land, and no incumbrance or defect of title is then understood, he must remove them or compensate for them before he can in equity compel the vendee to take a conveyance. Sugden, 345, &c. cites 2 Freem. 106; 2 Ves. jr. 437, *Taylor v. Stibbert*; and 4 Bro. C. C. 394; 3 Desaus. Ch. R. 266.

§ 2. The deft. may at the execution of his deed, in fact be seized and have a good right to convey, and yet he may engage to indemnify the plt. or grantee, and hence there may be a breach of this covenant and not of those of seizin and right. But there is no incumbrance so as to render a deed of conveyance of land bad and unlawful when an execution on an erroneous judgment, not yet reversed, is levied on a part of the land, or when a part is attached on *mesne* process, if the vendor will allow the vendee to retain so much of the purchase money as will indemnify him against such attachment; for these matters do not operate an unavoidable defect of title in them who engaged to convey a good estate.

§ 3. In this action the court held, that a public town-way over land conveyed, is an incumbrance within the meaning of a covenant that the premises are free of all incumbrances.

§ 4. In all these cases a lawful incumbrance must be shewn. As where the lessor covenants the lessee shall enjoy

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2 Mass. R.  
433.—6 Mass.  
R. 246.5 Mass. R. 67,  
*Borden v.*  
*Borden.*2 Mass. R.  
97, *Kellogg v.*  
*Ingersoll.*Pow. on  
Con. 379,  
*Broking v.*

Cham, Cro. Jam. 425.—Cro. El. 212.

**CH. 115.** the land free of the incumbrances of any person, and it is shewn that it is extended for debt to the king ; this is no incumbrance, because not shewn whose debt it was, and for any thing that appears, it might be the lessee's debt, and therefore, no lawful incumbrance is shewn. One must be so stated as to shew the covenantor liable in the action.

**4 Mass. R.**  
**627, Prescott**  
**v. Freeman.**

§ 5. So a paramount title is an incumbrance, and if the grantee having such a covenant extinguish it at a fair price, the sum he pays and interest are the measure of damages, and if the plt. has not removed the incumbrance, he shall have but nominal damages ; the same, 7 Johns. R. 358, or the covenantee may pay the mortgage off and sue his covenant.

**Mass. Essex,**  
**Nov. 1800,**  
**Ingalls v.**  
**Corlis.**

§ 6. This was an action of covenant broken in a deed, by which Corlis conveyed to Ingalls in 1788, a lot of land No. 3, in the sixth range of lots in Concord, or Guns Thwaite in New Hampshire, the consideration acknowledged was \$300, and the deft's. covenant was to warrant and defend the said lot to Ingalls in fee against the lawful claims of all persons ; and that the same lot was free of all incumbrances whatever.

August 6, 1763, Benning Wentworth, Governor of New Hampshire, being authorized by the king to sell lands, granted the township of Concord, including this lot, to the Concord proprietors on certain conditions of settlement, and there was no evidence these were performed.

October 1768, John Wentworth, the succeeding governor of New Hampshire, also authorized by the king to grant and convey lands, granted the same township to the Guns Thwaite proprietors, under whom Corlis by several intermediate conveyances claimed and held this lot. Ingalls after he purchased it, settled upon it under the Concord proprietors to whom so granted in 1763, and they entered and took possession of the township, taxed the lots, and he suffered this lot to be bid off for taxes ; but there was no evidence they evicted him by suit, nor that he had lost his land.

The court held : 1. That the second grant of 1768, could not be given in evidence to support Corlis' title, for though that of 1763 was on condition, and it might be the grantee's had not performed it ; yet the king or his governor could make no other grant of the same land in derogation of the first grant, till he had by some legal process re-possessioned himself of the land for a breach of condition ; that this was common law and law in all the colonies ; therefore the grant of 1768 was rejected.

2d. The other point decided was, as to damages, \$200, the sum proved to have been actually paid as the consideration, and interest. But this point has been much better settled since.

In this case it may be observed the land lay in New Hampshire, and the action was in Massachusetts; and so was the above case of *Marston v. Hobbs*: 2. That the king's grants on condition remained good till he vacated them by some legal process: 3. That the plt. recovered in covenant broken, on its appearing the deft. had no title to the land, and on the former proprietors entering and keeping up their claim, though they had never established their title by any action, and on a proper process it might perhaps be found they had none: 4. And, though the plt. had not been actually evicted or lost his land recovered, it does not appear in this case which covenant in the deed the court considered as broken, the covenants of seizin and of right were not mentioned, if in the deed the covenant of warranty strictly was not broken; as the plt. had not been in fact evicted. The Concord title then of 1763 viewed as better than the title of 1768, under which the plt. bought and paid his money, he sued to recover back, was probably viewed as an incumbrance to the amount of the value of the land at the time the deft. sold to the plt.; and that the consideration actually paid was as between the parties the measure of the value.

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§ 7. *Covenant of warranty, warrantors vouched.* This was a writ of entry *sur disseizin* in the post, which stated that Joseph Peasely was, April 1, 1756, seized, and died seized in fee, intestate, leaving his children, Daniel Peasely, four daughters, and two grand-children, to wit, Asa and Mehitable Pease-ly, issue of Joshua, younger son of the intestate, who died in his life time, leaving his widow, Abiah, and said Asa and Mehitable. By the Province law, two parts of his estate descended to said oldest son, four parts to said four daughters, and one to said Asa and Mehitable, and two parts of that one part to said Asa, and one to said Mehitable. Said Abiah married one Saunders, and had by him several children, and in 1757 said Asa died intestate, under age and unmarried, and without issue, on which his two parts of one part came to his heirs, to wit: one part to his mother, one to his sister Mehitable of the whole blood, and one to each of his mother's children by Saunders of the half blood to said Asa. In 1780, the mother died, and her part of Asa's part came to her children, viz: one part to said Mehitable, plt's. wife, two to her eldest son Daniel, and so to her children by Saunders &c., some of whom died, and parts of their parts came to the said Mehitable &c.; but to simplify the case she claimed only the first part in twenty-one that came to her from her grandfather in 1756. In 1766, said Daniel and four daughters by deed recited they were heirs of said Joseph Peasely, and conveyed to Nathaniel Peasely all their right in said Joseph's estate, with

Mass. Essex,  
Nov. Term  
1781, Tenny  
& ux. v. Saw-  
yer & ux.

CH. 115. warranty (the premises.) In 1768, said Nathaniel devised the same to said Ruth, the deft's. wife, and they entered. In Art. 9. 1759, the plts. and Saunders and wife reciting the death of the said Asa, the descent of his part and their receipt of money &c. released their right in said Joseph's estate to his heirs.

§ 8. The defts. vouched to warranty the grantors and their heirs to said Nathaniel Peasely, and they prayed to be admitted to defend in behalf of Sawyer and wife, and were admitted accordingly; and pleaded by their attorney, that said Sawyer and wife were not guilty. The warrantors relied mainly on the said release of the plts. as an *estoppel* to Tenny for his life (his wife was a minor when she signed it) at least. Judgment for plts. one part in twenty-one.

Same rule in  
Connecticut.  
2 Day's Ca.  
112.

§ 9. In this case it was held: 1. That a brother or sister of the half blood is heir with one of the whole blood by our law: 2. That the deed has no operation when neither the grantor nor grantee is in possession, and there is an adverse possession: 3. If a minor make a deed, and after he comes of age he acknowledges it, the same is valid: 4. It may be observed, that the devisee of a grantee vouched the grantors living, and the heirs of deceased grantors, on their covenant of warranty to the testator of the deft's. wife, as the warranty ran with the land, and so came into the hands of this devisee: 5 The warrantors were vouched merely to help defend, not for any purpose of recovering over in value against them, or any damages on the covenant, but the title they covenanted to defend against as an incumbrance to be removed, was left to be the subject of a personal action for damages on the covenant of warranty, or that the estate was free of incumbrances.

4 Mass. R.  
589, Clap &  
al. v. M'Neil.

§ 10. In this case the deft. sold a piece of land to the plt., bounded on a thirty feet street, (not laid out as a public way) "with the privilege of passing in said thirty feet street. At the time the deft. had a building that projected ten feet into it, leaving the way there twenty feet wide only. Held, this building was no incumbrance or ground of action to the plt., but the deft. might continue it.

9 Mass. R.  
28, Spring v.  
Tongue.

§ 11. Covenant broken in deft's. deed conveying half a pew in the new meeting-house in Saco, warranting it free of incumbrances; it was liable to be sold for \$36.53, expenses incurred in building the meeting-house. This was held not to be an incumbrance within the covenant made in October 1806; and January 1811 the proprietors assessed the said \$36.53, which the plt. paid to prevent its being sold; but the expenses arose before the deed for which the assessment was made. The court said the facts must have been equally known to both parties; if the pews had sold for a high price,

more than enough to pay for building the meeting-house, the profits had been the plt's., and if for less, the loss is his. CH. 115.  
Art. 10.

§ 12. This was covenant broken on a bill of sale of a sloop with the usual covenants of warranty. The incumbrance assigned in the breach was, that she was liable when sold to condemnation for a breach of our embargo laws, and was condemned therefor &c.; held, this incumbrance was within the usual covenants of warranty in a bill of sale. It seems the plt. had notice of this breach of law when he purchased her, but this made no difference. But the covenantee in such case cannot recover, if he may defend and does not. 9 Mass. R.  
496, *Ingersoll v. Jackson*.—  
14 Mass. R.  
139, same  
case. 13 Mass. R. 182.

§ 13. *Covenants of seizin, of right, of warranty, and of quiet enjoyment, when broken.* Action on such covenants in a deed, also against incumbrances. Held 1. Breaches were well assigned in the words of the covenants: 2. The entry of the covenantor tortiously and without title, is a breach of the covenant for quiet enjoyment: 3. The plt. must state an eviction as to the covenant of warranty, or his breach of it so badly assigned: 4. Where the plt. alleges the deft. was not seized, and he pleads he was seized &c., and plt. replies, he was not seized, because A at the time was seized of three undivided seventh parts of the premises, this breach is well assigned; as it shews the deft. was not absolutely seized in fee of the whole right: 5. Stating an outstanding mortgage and judgment when the covenant was made, and not averring a foreclosure or possession under the mortgage, is not stating a good breach of seizin, as a judgment of itself does not transfer the title or destroy the seizin. See *Marston v. Hobbs*, *Pollard v. Dwight*. The mortgagor is considered as seized till the mortgagee forecloses or takes possession. 7 John. R.  
376, *Sedgwick v. Hollenback*,  
cites *Cro. El.*  
544.—  
2 Show. 415.

ART. 10. *Covenants on licenses to sell &c.*

§ 1. In case of sales by order of court, by executors, administrators, &c. the maker of the deed ought not, nor does he mean to covenant that the person he represents was, or is lawfully seized, had or has good right to convey or to warrant the premises; but he means to convey such right or estate as this person had or has, for this representative cannot make any covenant or warranty that will bind the principal, or his estate, so as that judgment and execution thereon shall be against either; but like an executor or administrator endorsing a note, he can only bind himself. The estate of a deceased person cannot be bound so as to be subject to judgment and execution by any contract, covenant, or warranty but his own, and never by that of one who comes after him as his executor or administrator does. And if a guardian could by his contract, covenant, or warranty, bind the estate

**CH. 115.** of his ward so as to subject it to a judgment, and to be taken  
**Art. 10.** in execution, he would have power very effectually to dispose  
 of such estate, though real, without an order of court; also, every contract is personal, binding only on him who makes it and his representatives. No contract runs with the estate, but such as in its nature adheres to it; and there is no colour for a contract of a guardian running with the land. The opinion prevailing with many, that these representatives can bind the estate, real or personal, they represent or so have in their hands, has been a kind of common error; they ought to covenant only for their own acts, and so far they ought personally to be bound; but if they do expressly covenant, that the deceased died lawfully seized in fee of the land, or that the ward is so seized, they must be bound themselves by such express engagements, as one may by law engage to defend what belongs to another.

3 Mass. R.  
258, *Dean v.*  
*Dean.*—See  
Mass. Act,  
Feb. 19,  
1819.

§ 2. In this action the court held, that an administrator can sell only for the payment of the debts his intestate owed at his death. So is the statute that gives power to the courts to license executors and administrators to sell real estate to pay such just debts as he owed, and such legacies as he gave:—extends to charges also.

5 Mass. R.  
240, *Nason's*  
case.

§ 3. And it was further held in this case, that the administrator or executor can sell by license of court, lands of the testator or intestate, though the heir or devisee has aliened them, or they have descended; for the power so to sell is a bare authority, not defeated by any entry into, or disseizin of the land. However, our practice and opinions were otherwise formerly.

1 Mass. R.  
247, *Frothingham v.*  
*March.*

§ 4. In this case the plt. brought an action of covenant broken, against the deft. on a deed of land, in which the deft., as administrator on the estate of one Thomas, covenanted that he the said administrator was lawfully empowered to sell, and that he had observed the directions of the law in the case. The declaration stated the covenant and breach nearly in the words of it. A special plea in bar stated, that the deft. had kept his covenant, and how he had done it, by stating his administrator's order of sale and notice, which was four weeks successively in a newspaper, ordered by the court which authorized the sale, the first paper being published twenty-five days before the sale; so all within thirty days before the sale. There was a demurrer to this plea on this ground solely, that the notice was not sufficient; because an opinion had prevailed, and with some of the judges, that the last notice should be thirty days before the sale, at least. But in the present case the notice was adjudged sufficient, and that this clause in the act of February 14, 1789, sect. 6, viz. "and the printing and noti-

fication three weeks successively in such gazette or newspaper, as the court who may authorize the sale shall order and direct, shall be equivalent to posting up notifications as aforesaid," was an entire substitute as to time, place, and manner, to the former mode, which was by posting notifications in certain towns thirty days at least before the sale. This decision was altogether in conformity to the letter and meaning of the law. Also decided this term, that when the sale is to pay debts, no notice is necessary before passing the order to heirs or creditors. See new act of 1818.

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§ 5. These covenants made by March were the proper ones for an administrator to make, and the action was properly brought against him in his own right, though he in his deed covenanted as administrator, for it was in law his individual deed.

§ 6. This was an action of covenant broken, commenced by Elizabeth Sumner against the defts., on their covenants they made in form as administrators; but the court held, they were liable in their own right. They represented an insolvent estate, and obtained an order of court to sell the real estate of their intestate, for the payment of his debts, and sold an equity of redemption of which he was supposed so to have died seized; and the grantees at the same time bought in the mortgage; and the defts. in their deed did covenant in their said capacity of administrators, that they "were lawfully seized of the same tracts and parcels of land, that the same were free and clear of all incumbrances, by them or with their knowledge made, excepting the said mortgage and bond, and said Sarah Dudley's right of dower; and that they, the said Thomas and Joseph, as administrators of the said William Dudley, had good right to sell and convey the same tracts and parcels of land to the said Increase and Elizabeth, and that they would warrant and defend the same tracts and parcels of land to the said Increase and Elizabeth, their heirs and assigns, against the lawful claims and demands of all persons;" and they signed and sealed the deed as administrators. The grantees, Sumner and wife, were evicted by a paramount title, and this action was brought on the covenant to warrant, and the breach assigned was, that the defts. had "not warranted and defended the said tracts and parcels of land to the said Increase and Elizabeth," &c. "for that one Joseph Dudley of, &c. had good and lawful right as heir in tail of William Dudley, by virtue of a gift of one Joseph Dudley, deceased, and" at the Supreme Judicial Court, October term 1805, at Dedham, recovered judgment against the said Elizabeth, (said Increase died June 1799,) for his seizin of the same lands, with costs, and by his writ of seizin had possession &c., and evicted her

8 Mass. R.  
162, Sumner,  
admr. v. Will-  
iams & al.

CH. 115. &c., and still holds her out &c., and that she has expended  
 Art. 10. \$2000 in her defence against that suit; "and so she says  
 ~~~~~ that the defts. have not kept their said covenants, but have  
 broken the same &c.;" there were other counts. The decision was, that the defts. were answerable personally on these covenants; and that the measure of damages was the consideration money and interest, with the costs that had arisen to the grantees in defending against the suit by which they had been finally evicted; and not including the money paid for the assignment of the mortgage, nor for the release of dower by the intestate's widow. The sale was of the equity of redemption. Defts. put in eleven pleas, but they did not materially affect the main point decided, to wit, that on their covenants they expressly made and signed *as administrators*, they were personally liable. But Sedgwick J. was of opinion for the defts., that they were not personally liable. Sewall J. and Parker J. for the plts. Judge Sedgwick seemed to think, that if the covenants in this case did not bind the estate of the intestate, it did not follow that the defts. were bound in their private capacities; but he thought the statute gave them power to bind the estate to respond for the unsoundness of the title. This last opinion is almost entirely new. And on this point he cited *Griffith v. Goodland*, Sir T. Raym. 464; *Noble v. King*, 1 H. Bl. 36; *Macbeath v. Haldimand*, 1 D. & E. 172; *Unwin v. Wolseley*, 1 D. & E. 674; *Hodgson v. Dexter*, 1 Cranch, 345; *Brown v. Austin*, 1 Mass. R. 208; *Frontin v. Small*, Ld. Raym. 1418; *Combe's case*, Mod. 70, 960; *Rann v. Hughes*, 7 D. & E. 350; *Pearson v. Henry*, admr. 5 D. & E. 6; *Appleton v. Binks*, 5 East, 148; *Tippetts v. Walker*, 4 Mass. R. 595; *Thatcher v. Dinsmore*, 5 Mass. R. 299; *Barry v. Rush*, 1 D. & E. 691. So if one a trustee convey lands to A, and covenant as trustee he is seized, he is at law personally bound. 2 Wheaton's R. 45. Especially if he also binds his heirs, executors, and administrators,—on the same principle.

1 Mass. R.
240.

§ 7. If an executor or administrator apply for license of court to sell lands to pay debts, notice to the heir is not necessary.

6 Mass. R.
149, Hays &
al. exrs. v.
Jackson & al.

§ 8. This was a petition for license of court to sell real estate to pay debts. And held, the court may direct the sale of any specific part of the estate, and the court directed the executors first to sell the lands not included in the specific devise, next the lands not devised but descended, being purchased after the will was made. In this case on notice the heirs at law appeared, as also the residuary legatee. An administrator licensed &c. could *bonâ fide* adjourn the sale before the act of 1818. 15 Mass. R. 175.

§ 9. *Entry sur disseizin*, on the demandant's own seizin, and disseizin by the tenant. And held, the Court of Common Pleas have authority to grant licenses for the sale of lands of one *non compos mentis*. Statute of 1783, ch. 32, gives such power, but that of 1783, a. 38, does not; but held, they are both affirmative and may stand together.

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Art. 10.

9 Mass. R.
374, *Smith v. Smith*.

Mrs. Hancock, as administratrix of the estate of John Hancock Esq. petitioned for license to sell part of his real estate for payment of his debts. And his heirs at law appeared and objected. And on a hearing it appeared the only debt, not paid, was one secured by a mortgage, and that the mortgagee was in possession, and had never demanded the debt; that administration had been granted above four years; and that the heirs offered to save the administratrix harmless from all damages and costs by reason of the said debt; and that the said mortgage premises had been assigned to her as her dower in his estate. On these facts the court refused her a license to sell. Points well stated in this case: 1. The creditor's claim is paramount to every title, that can be acquired after the decease of the debtor: but 2. This claim is limited as to time, as he can give it effect only by getting judgment against the executor or administrator: hence 3. Whatever defeats such action, will destroy the creditor's lien: therefore 4. The administrator can protect the land, in the heir's hands, by pleading the general statute of limitations, when applicable to the case: but 5. An administrator is not bound to plead it, nor is it waste not to plead it; so the land may be indefinitely bound at the will of the administrator: 6. This opens a wide door to partiality and collusion, therefore demands against the deceased's estate ought to be seasonably presented and settled, while the heirs and others concerned have their evidence preserved to shew the true state of every demand.

13 Mass. R.
162, 169,
Scott v. Hancock & al.

By 8 W. III., ch. 36 & 37, the courts had power to license executors or administrators to make sale of the reversion of the widow's dower for payment of the deceased's debts; and an administratrix conveyed the whole of her intestate's estate by metes and bounds, except such dower; and except it was covenanted against all incumbrances. Held, the reversion passed. Intestate's estate was insolvent, and his heir brought his real action to recover this reversion. License was to sell the whole estate, and this recited in her said deed.

15 Mass. R.
26, *Leverett v. Armstrong*.

Though the probate judge certify there is a deficiency of personal estate to pay debts &c., yet the court may at its direction refuse a license to executors or administrators to sell real estate to pay debts: 2. The license cannot be granted after the four year's limitation, (statute 1788, ch. 66; 1791, ch. 28,) to an executor who paid debts within that time be-

15 Mass. 68,
Allen, exr. petitioner for sale, &c.

CH. 115. yond the personal estate, unless the real estate remain in the condition it was at the death of the deceased, not divided, or sold &c., or unless he applies for such license in a reasonable time : 3. The lien of creditors on the real estate continues only during said four years if they do not sue in that time. In this case three devisees, two had released to the third, the executor who had mortgaged, &c.

2 Johns. R. 595, *Clute v. Robinson*.—New on Con. 42, 234, &c., *Langford v. Pitt*.—New on Con. 227 to 255.—4 Bro. C. C. 329, *Fordice v. Ford*, 494. —2 P. W. 629. 5 Munf. 185, *Graham v. Hendren*.

§ 10. A covenant to execute a good and sufficient deed of lands &c., is to be construed an operative conveyance, one that gives a good title to the lands conveyed ; and not merely a deed good and sufficient in form. And the conveyance of a title admitted to be doubtful, is no performance of such a covenant, but if the covenantor seasonably acquires a good title, and before he executes his deed, it is sufficient ;—or before a decree. 2 P. W. 629. When one contracts to convey lands &c., the goodness of the title and time of making it good, has been matter of much discussion in equity, but the principle in *Langford v. Pitt* seems, on the whole, to be the true one,—is, to convey must mean effectually to convey, and the title is in time, if good when the conveyance is decreed. 7 Ves. 265 ; 2 Anstr. 527, *Smith v. Burnham*. And this is in season though the contract fix an earlier day for conveying. 7 Ves. jun. 202, 279, *Seton v. Slade* ; 10 Ves. jun. 315, *Mortlock v. Butler*. Where equity will rescind a covenant, 2 Wash. 115 ; 1 Hen. & Mun. 428 ; 7 Ves. jun. 376. As to damages on these covenants of seizin, &c. &c. there are some differences in the different States, noted 2 Wheaton's R. 63, 65, and in fact at different times in the same State.

Statute, Feb. 1818, Maine acts, ch. 51, 52, pp. 139 to 187, 187 to 197.

§ 11. The probate court, on petition, may license executors, administrators, and guardians, to sell real estate of the testator, intestate, or ward, for the payment of debts ; as well estate held by either executor or administrator, recovered on mortgage to the deceased, or estate set off on execution to the executor or administrator for the use of the devisees or heirs, as other estate, notice in newspapers, &c. If any of the persons interested give bond with sufficient sureties to pay debts and legacies with incidental charges, the license shall not be granted. No such license continues in force more than a year. Also the probate court may license executors and administrators to sell real estate for the payment of charges of administration. See, also, Mass. Act, February 19, 1819.

Statute 1818, ch. 112.

Statute, Feb. 1818.

§ 12. If an executor, administrator, or guardian, be unable to attend at the probate court to settle his account, the judge, by *dedimus*, may authorize some disinterested justice of the peace to administer the oath to him, and to certify the same, and to return the *dedimus* and the accounts and vouchers.

§ 13. This act authorizes executors, administrators, &c. of persons deceased out of this State, to sell and convey their real estate in it in a certain manner on license of court; that is, executors, administrators, and guardians, living in all the other States, to sell real estate in this State, on their filing in a probate court in it attested copies of their appointments, and of their powers given them in them, respectively enabling them to act as executors &c.; also of the bonds they give in them to account for the proceeds of such sales. But such powers must be given by a court having probate jurisdiction in the other States.

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Mass. Act,
Feb. 21,
1819.

§ 14. The Supreme Judicial Court is empowered by this act to license guardians of persons given to excessive drinking, idleness, gaming, &c. to sell the whole or part of their estates, as may appear for their benefit, as in cases of executors and administrators; but there must be a certificate from the overseer of the poor approving &c. Bond may be to the judge of probate of the county in which the real estate lies, if the deceased was not an inhabitant of this State. Third section, license extends to charges of administration as well as the payment of the debts and legacies of the deceased.

Mass. Act,
Feb. 19,
1819.

ART. 11. *Special matters in this chapter.*

§ 1. The legal operation of a covenant of warranty to defend lands to one, his heirs, and assigns. Where one covenants he is lawfully seized of land in fee; has a legal right to sell and convey it, or that it is free of incumbrances, the law considers him as engaging, that so is the fact, that he is so seized; that such is his right, and that so the land is free; and if not so the grantee may immediately sue and declare against him on this engagement; for if the fact be not true, or the right be not so, the covenant is broken as soon as it is made, and the covenantee need not wait till he is evicted. This was the case of *Ingolls v. Corlis*, above; when *Ingolls* sued he had not been evicted. And the averment is, that the party was not so seized.

§ 2. So according to these authorities if one covenant he is lawfully seized or possessed; or that he has a good estate &c., and in fact has not; but some other person has an estate in the land before him, his covenant is broken as soon as it is made.

3 Wood's
Con. 539,
551, 553.—
Cro. Jam.
304.

§ 3. So in this case he covenanted in a lease he had full power to let the premises, according to the form and effect of the indenture. *Salmond*, the lessee, averred in his declaration, that *Bradshaw*, at the time of making the indenture, had not full power to let the premises, according to the form and effect of the indenture, to the plt's. damage &c. On error brought, all the judges held, this was a good declaration; and

9 Co. 60,
Bradshaw's
case.

CH. 115. that the plt. need not aver what person had right or title, estate or interest, in the land ; for it follows the covenant negatively ; and the lessor best knew what estate he had, and ought to shew his estate. And see *Pierson v. Foster*, next chapter.

Art. 11.
Cro Jam.
304, same
case.

Hob. 12, Hol-
der v. Taylor.
—3 Wood's
Con. 553.

§ 4. Holder brought covenant against Taylor, the lessor, and declared he demised to him the land for years ; and that at the time of the demise he was not lawfully seized of the land, but that a stranger was ; but the plt. did not lay any actual entry by himself on the lease ; nor any ejectment by the stranger, or by any one under him. It was objected, that no action would lie, because there was no expulsion. But held, that the action lay ; for the breach is, the lessor has demised that which he has no good right to do, so his covenant was false and immediately broken.

§ 5. But where the party warrants the land, he makes no such engagement, *he is seized &c.* ; but he engages to defend the land, and if he cannot defend it, the law holds him to pay an equivalent in damages, or in ancient times to give other lands in lieu &c. ; hence the mere warrantor is not liable to pay these damages, or to make this equivalent, until the warrantee is evicted, and the warrantor fails to defend ; the warrantor only engages to defend the land, if he can, and if he cannot, then to pay the value &c. And it is solely on this ground the damages have relation to the time of the eviction ; for if where the warrantor has no title, his engagement is broken as soon as it is made, the damages then accrue or attach in the warrantee, and cannot be increased or decreased by subsequent events, but must be according to the value of the estate at the time of the warranty made. But this is not the case. Damages are invariably given according to the value of the estate warranted, at the time of the eviction, as in many cases. And if the writ of *warrantia chartæ* lay in England before eviction, it is only for security ; but the damages must follow the eviction. This writ lies not in this State, if in any of the United States. On the whole, we find nothing in the books to justify the assertion that *seizin by wrong* satisfies the expression, *lawfully seized*. And see Ch. 116, a, 2, s. 10.

Hob. 23, Roll
v. Osborne.

F. N. B. 312.

5 Co. 71,
Hoe's case.

§ 6. It was objected in this case that the plt. on his warranty had declared to his damage, where no loss appeared. But it was held, that he shall recover no damages, but where he has taken loss by a recovery, already had against him ; and therefore he shall not have damages where the warranty of charters is brought before the action *quia timet* ; and therefore if the deft. plead that the plt. is not impleaded, the plt. shall presently have judgment, but no damages.

§ 7. Sullivan's opinion on this point is not correct when he states, that "warranty is a covenant real annexed to the lands or tenements, whereby a man and his heirs are bound to warrant the same," on voucher or warranty of charters to yield other lands to the value of those that be evicted. It is true the warrantor and his representatives are bound to warrant the lands, and if evicted to pay the value. But it is not strictly true to say, "the warranty in Massachusetts amounts only to a covenant that the grantor is seized in fee, and that he has good right to sell;" for if only such a covenant, then where there is no title in the warrantor, his covenant is broken as soon as it is made, as above stated, and damages attach as before, and properly relate only to the time of making the covenant. But the truth is, a warranty is not strictly such a covenant; but, technically, an engagement to defend the land as before stated, and hence in all our deeds it is not surplusage or tautology, to add it after such covenant that the grantor is seized. This word however may vary like other words, according to the subject matter. And therefore Wood says, if A conveys with warranty in fee to B, and he is evicted by another title for a term of years, he may have covenant against A, though the warranty be annexed; for said words make a covenant, if a chattel be evicted, and a warranty if a freehold be demanded. If therefore an express warranty, and an implied one, the warrantee may declare on either; and if the heir be not bound to warranty expressly, no action lies against him.

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Sul. Land Titles, 311, 312, 329.

Sul. 318.

3 Wood's Con. 494, 495.

Sid. 313.—F. N. B. 1312.

CHAPTER CXVI.

QUIET ENJOYMENT, AND SAVE HARMLESS.


ART. 1. *General principles.*

§ 1. By the covenant in law the lessee is to enjoy his lease against the lawful entry, eviction, or interruption of any man, but not against *tortious entries* or *evictions*, for against *tortious* acts the lessee has his remedy against the wrongdoers in actions of trespass. The same reason applies to express covenants. To enjoy the term, and to enjoy it against all men, is the same. Hence the lessee shall not have his action against

Vangh. 118.
—3 Wood's
Con. 554 to
569.—Pow.
on Con. 378,
379—4 Co.
80, Noke's
case.—8 Co.
91.—Cro.
Car. 5.—
Cruise, 66.

Jones, 197.—Lofft, 460.—2 Saund. 181.—4

CH. 116. the lessor, unless legally ousted. But if the lessor expressly

Art. 1.  covenant that the lessee shall enjoy his term, without the entry or interruption, be it lawful or tortious, here the lessor is liable for the tortious entry of a stranger, for his covenant can have no other meaning. The covenant in law, as by *dedi*, or *demise*, is only against lawful entries, evictions, or interruptions, and not against tortious ones; the reason is clear; for if a man disturb another in his possession unlawfully, the law gives him a remedy against the disturber; and the law gives the covenantee no remedy on his covenant, when he has a just and proper remedy against the trespasser, "for a man shall not have a double remedy for the same injury against the covenantor, and also against the wrongdoer." The reason is equally good whether there be an express or an implied covenant. Hence the rule is, "that the law never judges that a man covenants against the wrongful acts of strangers, unless the words of the covenant be full and express to that purpose: 1. Because such construction would be extending the covenant to a case wherein the law has before given a remedy against the wrongdoer himself: 2. Because it is straining a man's words beyond a reasonable intent, to infer from general terms, that he meant to covenant against tortious acts of strangers, which he cannot possibly prevent, or probably attempt to prevent. This construction is clearly settled in respect to covenants in law," 22 H. VI. 52 a; 32 H. VI. 32 b; and as to express covenants, Cro. Jam. 425, Broking v. Cham; Cro. Jam. 315, Kirby v. Hansaker, and 444, Leigh v. Gotyer; Cro. El. 914, Chantflower v. Prurtly. In all these and other cases, the law makes a clear distinction between *tortious* and *legal* entries.

¶ 2. And if A covenant for quiet enjoyment against him, his executors, administrators, and assigns, the covenant is not enlarged against them, but is restrained against others; for it is intended to be only for enjoyment against the legal eviction of A, his executors, administrators, and assigns, and of no other persons; but the effect of such an express covenant against assignees only is to narrow the covenant in law, implied in the words *dedi* or *demise* &c., as against all men.

¶ 3. Even the disturbance of the covenantor must be lawful to make a breach of his covenant. As where A leased to B, and covenanted that he should enjoy the lands leased quietly to his own use, without any lawful impediment, suit, or disturbance, &c. of A, and he entered on B and disturbed him in taking the profits, without any lawful title, but as a trespasser. And the court held, that this was no breach of the covenant; for that is expressly limited that he shall enjoy the lands without any lawful disturbance, and so a disturbance

Roll. Abr. 429.
—5 Vin. 156.
—3 Wood's
Con. 558.

3 Wood's
Con. 558.

by tort is out of the covenant. But see *Andrews v. Partridge*, post; and *Hob. 35*. A's tortious entry is a breach, if the word *lawful* be not used; thus using the word *lawful* makes a material difference. CH. 116.
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§ 4. *The law itself defends every man against wrong.* Hence in a case where the grantor or lessor covenants with the grantee or lessee, that he shall quietly hold and enjoy the premises, against all persons lawfully claiming under him, or certain persons, as the parties may agree, for the covenant may be general or special, and like warranty looks forward and runs with the land, but it does not extend to wrongdoers, though it be that the grantee shall peaceably enjoy the premises without the let or interruption of the grantor and his heirs, or of any other person whomsoever; nor is it broken by a confiscation of the estate, not founded in law. As where land was confiscated in New Jersey, in the American revolution, and the British courts held this confiscation void, and so as not affecting the covenants in the deed. Dyer, 238.—
4 Inst. Cl.
815.—3 D. &
E. 684, *Dud-*
ley v. Folliot.
—Bul. N. P.
161.—4
Cruise, 79.—
Noble v.
Smith, 1 H.
Bl. 34.—2
Johns. 4.—1
Johns. 122.—
1 Bay, 259.

Nor does the law adjudge that the lessor covenants against the wrongful acts of strangers except his covenant is express to that purpose; for the reasons above stated, and for a further reason, only the party in possession can punish the trespass. 2 Saund.
178 a, *Wot-*
ton v. Hele.
—1 Ch. on
Pl. 111.

ART. 2. *Acts must be done to disturb, &c.*

§ 1. This kind of covenant for quiet enjoyment may be annexed to any kind of estate of inheritance, for life or for years. And if the grantee or lessee be disturbed by title paramount, he may have an action of covenant broken; but in this declaration he must shew some act that amounts to a disturbance of this quiet enjoyment; and he must state the act specially, and so assign a breach specially by shewing how he is disturbed or evicted. He avers he is disturbed, and pleads in the affirmative, and on a general principle must shew how; nor is every disturbance of the grantee or lessee a breach of the covenant, therefore such an entry or eviction must be specially stated and shewn as will amount to a legal disturbance and breach of the covenant. Must be an *eviction*, or *actual ouster*, by paramount lawful title. 2 Mass. R.
433, *Marston*
v. Hobbs.

8 Johns. R.
198, *Waldron*
v. M'Carty.
3 Johns. 471; 5 Johns.
R. 120.

§ 2. In this case the court appeared to view our covenant of warranty, as a personal covenant in this State, and "in essence a covenant for quiet enjoyment, on which no action can be maintained till disturbance in that enjoyment." The plt. must not only state the covenant, but also such disturbance specially as shews a breach of the covenant of quiet enjoyment. 1 Mass. R.
464, *Emerson*
v. Minot Pro-
prietors.

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Tisdale's case, 1 Esp. 322.—Hob. 35.—Cro. El. 213.—2 Saund. 178.—3 D. & E. 684, Dudley v. Folliot.—Cro. Jam. 425.—Com. D. 230.—10 Mod. 384, Chaplain v. Southgate.—1 Stran. 400, Perry v. Edwards.—Com. 230.—A suit in equity is now a disturbance &c., Calthorp v. Hayton, 2 Mod. 64.—1 Esp. 323, Whichcott v. Nine. 3 Mod. 135, Mosse v. Archer.

2Saund. 181a, b; cites 2 Lev. 37, Proctor v. Newton.—3 Lev. 325, Buckley v. Williams.—4 D. & E. 617, Foster v. Pierson.—8 D. & E. 281, Hodgson v. E. I. Company.—Hob. 12, Holder v. Taylor.

2 Saund. 181 b, Lloyd v. Tompkins.—Haynes v. Bickerstaff, Vaugh. 118.—7 Johns. 380.

§ 3. Where there is a covenant of quiet enjoyment, the tortious ejectment of a stranger is no such disturbance as to work a breach of this covenant; as for this wrong the lessee may have trespass against the wrongdoer. But if the stranger claim by elder title than the lessor's, the lessee may have covenant against him; as the lessee can have no action against the stranger. "But if the lessor covenant expressly that the lessee shall enjoy, during the term," "quietly, peaceably, and without interruption," "this will extend as a covenant against all tortious ejectments whatever," and a tortious interruption is such a disturbance as entitled the covenantee to his action. So when the "lessor may covenant against the acts of a particular person or persons, in which case covenant will lie, in case of a tortious ejectment by them;" the breach of this covenant must be by some act that really disturbed the covenantee. Hence in covenant for quiet enjoyment, and the lessee underlets, and the lessor forbids the tenant to pay his rent, this is no breach of the covenant, for here is no act done, that amounts to a legal disturbance, no expulsion, no eviction, and this forbidding the tenant may disregard. *Hunt v. Danvers*.

§ 4. It is a general rule, if the lessee be disturbed so as to entitle him to his action, he must not only state and shew how he is disturbed, but also that the disturber has right and title; but it has been a question if he must state particularly that title, as he may not know the particulars of a stranger's title; and the better opinion is, that he is not held to state particulars, and it has been held enough to allege that, at the time of the demise to the plt., J. S. had lawful right and title to the premises, and having such lawful right and title entered and evicted him, without shewing what title J. S. had. Nor is it necessary to state the plt. was evicted by legal process, but it must be stated that the person evicting had a lawful title before or at the time of the date of the grant to the plt., and an averment that he had a lawful title, without this qualification, is too general, and bad after verdict. And this better opinion is confirmed. 2 Show. 425, *Crosse v. Young*; 1 D. & E. 671, *Lloyd v. Tompkins*; 2 Bos. & P. 12, *Browning v. Wright*; and the case of *White v. Ewer*, Cro. El. 823, was overruled; 11 Johns. R. 122; 1 Ch. on Pl. 111; *Newin v. Munns*, 3 Lev. 47.

§ 5. But where the covenant is, that the grantee, lessee, &c. shall quietly enjoy without the let or interruption of the covenantor himself, his heirs, or executors, it is held to be a sufficient breach to allege that he, or his heirs, or executors, entered, without shewing it to be a lawful entry, or stating his title to enter; but some particular act must be shewn by

which the plt. is interrupted, and such act must be within his knowledge.

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§ 6. In this action all the judges held, the plt. in his declaration must state an elder title, otherwise it might be a title under the plt. himself, and the lessee knows the title of a stranger as well as the lessor. Lessor going on the land to sport is no breach. 13 East, 72.

Cro. Jam.
315, Kirby v.
Hansaker
Seddon v.
Senate.

§ 7. This was an action of covenant in an indenture to lead the uses of a fine, in which the cognisor covenanted that the cognisee should quietly enjoy the lands and not be molested. The plt. alleged in his declaration, that the deft. had disturbed him, &c. Plea, had not molested him, &c. Replication assigned a breach for that the plt. was seized of a close, parcel of the lands &c., and there was a lane leading to the close, through which lane the plt. had a way to the close, and that the deft., such a day, did erect a gate across the way, by which the plt.'s tenant was obstructed in the quiet enjoyment of the close, &c. There was a general demurrer to this replication. And it was adjudged good in the Common Pleas, and on error affirmed in the Kings Bench, the way appearing to be necessary to the close; and not material, as it respected the deft., whether the gate was set up by right or by wrong. In this case the covenantor himself was the disturber, in a way of necessity included in his grant.

8 Mod. 318,
Andrews v.
Paradise.

§ 8. This was covenant broken. The deft. leased a farm and two closes to the plt., and there then was a pretence set up of a right of common to the closes. On this account the lessor covenanted with the lessee, "that he should quietly enjoy the said two closes, against all claiming or pretending to claim any right to them." On this covenant the lessee sued and assigned his breach, "that such a one having, or pretending to have a claim, time out of mind, did enter upon the said closes." The deft. demurred, and said this covenant extended only to legal, not tortious claims. Therefore, the plt. should have stated the claim of the disturber was a legal one.

10 Mod. 387,
Chaplain v.
Southgate.

§ 9. Judgment for the plt., and the court held, that this covenant extended to all interruptions, legal or tortious; and that was the meaning of the parties, nor is it like the cases cited of Kirby v. Hansaker, and Bickerstaff's case. In Kirby's case it "did not appear but that the disturber might claim even under the lessee himself; but this is impossible here, by reason of those words, *time out of mind*."

§ 10. "A covenant that the deft. was lawfully seized, is intended as to the title; and a covenant for quiet enjoyment is intended as to the possession," and shall not be construed to extend to tortious ejectment by a stranger, unless so expressed.

3 Wood's
Con 552.—
Bull. N. P.
161.

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Dougl. 43,
Hurd v Ex-
ecutors of
Astley.

§ 11. A fine was levied of the wife's land with a joint power to her and her husband to declare the uses, and they declared them in remainder to Lord Tankerville; the husband leased to the plt. and covenanted for his quiet enjoyment against Astley, the lessor, his heirs or assigns, or any person or persons claiming, or to claim, by, from, or under him. Lord Tankerville succeeded to the estate and evicted the lessee, and it was held, that covenant lay against the husband's executors on their plea, that Tankerville when he entered "did not claim, nor was he entitled to the premises by, from, or under the said Sir John Astley;" for as Astley was a necessary party to the second declaration of uses, whereby the estate to Tankerville was limited, he clearly claimed under the husband, Astley.

2 Vent. 213,
Morgan v.
Hunt.—
1 Esp. 341.—
Johnson v.
Procter,
Yelv. 175.

§ 12. But the covenant for quiet enjoyment must be confined to the subject matter of the covenant or undertaking; therefore, when the lessor covenanted that the lessee should quietly enjoy, it was adjudged to be no breach, that the lessor exhibited a bill in chancery against the lessee for ploughing meadows, and obtained an injunction which was dissolved with £20 costs; for the covenant was for quiet enjoyment, and this was a suit for waste, and so no disturbance the lessee had a right to complain of. The wife's dower is claimed under her husband.

Sugden, 407.

Cro. Jam.
657, Butler v.
Swinerton.
Swann's
case was on
a covenant
in law only.
Sugden, 408.
See Howes v.
Brushfield.—
Hesse v.
Stevenson,
3 Bos. & P.
365.—Sug-
den, 406.

§ 13. But if a man levy a fine, purchase land to him and his wife, and his heirs in fee, and then leases for years to J. S. and covenants for himself, his executors or assigns, that the lessee, his executors and assigns shall quietly enjoy and hold the premises without the let of the lessor, his heirs and assigns, or any other person by or through his or their means, title, or procurement, and afterwards the lessor dies, and his wife enters and disturbs the lessee, the covenant is broken, and an action lies; for though the wife claim by the conusor, yet she is in by means of her husband, the lessor, therefore, she is a person who claims by his means, though by a title derived from another. Sugden says, the covenant extended to her capacity; she was a minor.

4 Co. 80.

§ 14. Where there is an express covenant in a deed for quiet enjoyment, the implied covenant is gone, *expressum facit cessare tacitum*, but this maxim does not hold in all cases.

§ 15. On the whole, it appears from all the authorities clear, that this covenant for quiet enjoyment does not extend to the tortious act of a stranger in any cases, unless there be some expression used in the covenant, shewing the parties to it meant it should extend to such an act; and the case of *Chaplain v. Southgate* must have been decided on the ground the covenant was against all pretending to claim, and so one

claiming right or wrong was within the covenant : 2. There must be an actual disturbance of this quiet enjoyment to entitle the covenantee to an action, by expulsion, eviction, ouster, or some actual interruption on the land, made by the third person : 3. It must be in virtue of a title existing in him when the covenant for quiet enjoyment was made : 4. Such a title must be stated and shewn by the plt. generally, in order to shew the disturbance is by elder and better title, and not under the plt. himself : but 5. The plt. is not bound to state the particulars of the disturber's title ; for the law does not presume he knows them : 6. Where the disturbance is a trespass the covenantee ought to bring trespass against the wrongdoer : 7. The opinion of Ashhurst J., that it is enough if the disturber claim title, though, in fact, he has none, is not supported by the current of authorities.

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Art. 3.

§ 16. If the vendor covenant with the vendee for his quiet enjoyment against the vendor's acts &c., and yet suffer a quit-rent to be in arrear &c. this is a breach of his covenant.

4 Cruise, 86.
—Howes v. Brushfield, 3 East, 491.

ART. 3. *American cases.*

§ 1. This covenant for quiet enjoyment is wholly a contract at common law. There is no statute in this State, if in any State in the Union on this subject. The whole doctrine, therefore, on the subject is derived from England and the principles of the common law. And American cases must be the same in principle as the English, and must be decided on the same grounds. And if the estate to which this covenant for quiet enjoyment is annexed, be absorbed in a greater estate by *merger* or by *remitter*, or by discontinuance or otherwise, this covenant here as in England ceases, when such estate so ceases, and every principle applicable to this covenant there, is applicable to it here. So few actions on these covenants for quiet enjoyment have been brought, and so little in use as experience shews they are, it does not appear to be very necessary to pursue this branch of the law far, in regard to which but very few American cases are to be found,—but one in the Mass. Rep., that above stated, of *Ellis & al. v. Welsh*, which was a covenant in a lease that the lessee shall hold and occupy the demised premises during the term, and the court decided that this amounted to a general covenant for quiet enjoyment during the term. And the court said, in an action of covenant broken, “ all deeds are to be construed agreeably to the intent of the parties ; and in a lease or conveyance containing a general covenant for quiet enjoyment, it must be presumed that the parties had in view evictions, entries, or disturbances, to be made by virtue only of existing rights, and not of rights afterwards to be acquired ; for these it cannot be presumed from the general words of the covenant were con-

6 Mass. R.
246, *Ellis & al. v. Welsh.*

Cx. 116. templated." Speaking of a town-way laid out over the land after the lease was made ;—and the power of the town to locate ways cannot be viewed as an existing incumbrance, nor can that of the public to lay out convenient roads " be deemed an existing right within the intention of the parties to the lease." It is one of the incidents of our tenures ; and " a covenant against the exercise of this prerogative would be a covenant, not against any existing right or interest in the land, but against a naked possibility." Cited Dyer, 42 b, *Grenelife v. W.*, where it was holden, " that when a man binds himself and his heirs to warranty, they are not bound to warrant against new titles arising through the feoffee, or any other person after the warranty is made ;" that a " general covenant in a lease for quiet enjoyment extends only to entries and interruptions by those who have lawful title, but not by wrong doers ; for the tenant has his remedy by action for all tortious entries and disturbances." Cited D. & E. 584 ; Hob. 24, *Tisdale v. Sir William Essex*.

4 Johns. R.
123, Pitcher
Livingston.—
7 Johns
173, Waldo
v. Long.

§ 2. *Damages in covenant of seizin and quiet enjoyment in New York.* Only the consideration money paid with interest and costs of ejectment ; the covenantee cannot recover damages for the improvements he has made, or the increased value of the land. This is our rule in cases of covenant of seizin, for reasons above ; but as to covenants for quiet enjoyment, as they are not broken when made, but only by some future disturbance or eviction, then the principle of breach of warranty applies as to damages if they stand alone. *Spencer J.* dissented.

5 Johns. R.
120.

§ 3. A covenant of quiet enjoyment extends only to the possession, not to the title, and is broken but by eviction or disturbance of the possession ; but is subordinate to that of seizin when in the same deed.

Waldo v.
Long, 8
Johns. R.
198.

§ 4. When the grantee of land sues the grantor for breach of covenant against incumbrances in the deed, it is sufficient for the grantee to shew the *postea* in ejectment brought against him by a mortgagee on a prior mortgage of the same land. This evidence supports the grantee's action.

2 Wheat. R.
46, Duval v.
Craig & al.

§ 5. A, B, and C, grant lands to D, and covenant against incumbrances made by them ; D may sue on this, though they also covenant as to themselves and others, and on eviction of D to compensate him in other lands of equal value ; for such covenants are independent of each other ; then when D sues on said first covenant he need not allege any eviction, as that applies only to the second covenant, nor any demand or refusal as to said other lands, enough to allege a prior incumbrance made by the grantors.

ART. 4. § 1. Covenants to save harmless are in principle the same as covenants for quiet enjoyment; and like those covenants to save harmless extend not to tortious acts, though expressed to be against all persons, but otherwise, where the covenant is particular against the acts of a particular person. As where the deft. stating he had sold goods to the plt. which had been seized at Archangel by Edward Bell, covenanted to save the plt. harmless from all damages and costs relating to such seizure, the plt. assigned for breach, that Bell having arrested the goods by pretence of a debt due to him from the deft., as to which arrest the plt. was put to £1500 expense, and this expense the deft. had refused to pay. The deft. objected, and said that this covenant extended not to tortious acts, for which the plt. had a remedy; hence a title in Bell should have been stated: and cited 4 Co. 80; Vaughan, 118; Cro. Car. 443; 1 Mod. 219; 2 Vent. 61; Cro. El. 828. The plt. agreed that it was a general rule the plt. must shew a title in the disturber; but then this rule extends only to the case of a general covenant, and not when it is particular against the acts of particular persons, for then it takes in even tortious acts. Cro. El. 212.

Cm. 116.

Art. 4.

1 Esp. 823.—
Stra. 400,
Perry v. Ed-
wards—
Pow. on Con.
389.

Hob. 36, Tie-
dale v. Essex.

§ 2. The court held, this pretence of Bell's being recited in the covenant, shews it was meant a security against it in all events; and though it should be tortious, yet being particular it comes within the difference taken. Judgment for the plt.

§ 3. The lessee of a term rendering rent assigned it to J. S., and he covenanted to save the lessee harmless of all rents, payable to the lessor; and afterwards J. S. let a part of the land to the first lessee, and his hay was there distrained for rent arrear. The court adjudged this to be no breach of the covenant; for the distress of the hay was unlawful and a trespass; and the sufferance of the rent to be in arrear was no breach of the covenant, without actual damage. And this covenant to save harmless is no more "broken by the tortious act of any one," than the covenant for quiet enjoyment.

1 Esp. 825,
Cooper v.
Pollard.—
3 Wood's
Con. 607.

§ 4. This was an action of covenant on an indenture of a lease for 99 years, dated June 1, 1664, to save the plt. harmless of all evictions during the term. The breach assigned was an eviction, June 26, 1664. Plea, the deed was first delivered July 17, 1664, which was after the breach assigned; and further pleaded, the plt. was not ejected after the delivery of the deed, upon which the plt. demurred, and had judgment.

3 Wood's
Con. 606.

§ 5. Covenant to save harmless and indemnify the plt. and his lands in Sale from an annual rent of such a lease during the said term. Plea, that from the time of making the said writing hitherto, he saved the plt. and all his said lands from the said rent, and *hoc paratus*. The plt. demurred, for that

CH. 116. the deft. ought to shew how he exonerated, it being a plea in the affirmative; but had he pleaded *non damnificatus* it had been good.

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3 Wood's
Con. 606.

§ 6. This was covenant to save harmless from suits and lawful evictions. The deft. pleaded performance. The plt. replied, that J. S. took out a writ of possession out of the B. R. in due form executed, and by virtue thereof entered on the plt's. possession and expelled him. The deft. demurred and had judgment; for in due manner (*debito modo*) is not sufficient, without shewing particulars and how done.

3 Wood's
Con. 606,
607.

§ 7. If a man enter into a bond with another for his debt, with condition to pay the money at a certain day, and the principal engages to discharge the surety and save him harmless from the said obligation, and afterwards he does not pay the money at the day, whereby the bond is forfeited, and the surety to avoid suits pays the money, he may have an action against the principal, for the surety need not wait till he is sued. (The surety's deed does not extinguish the principal's simple contract.)

6 D. & E. 176.

3 Wood's
Con. 607.

§ 8. And it is a general rule when one pleads he has saved another harmless, he must shew how; for his plea is in the affirmative, and the court ought by the plea to be informed if he has done enough to save the party harmless.

1 Esp. 367.—
4 Co. 80,
Noke's case.
—2 Lev. 37,
Procter v.
Newton.

§ 9. So it is a general rule in pleading, as to quiet enjoyment and saving harmless &c., that the declaration ought to state the disturbance or eviction, and the damnification &c. as to be by a person by claim of title, and by a good and elder title; and it is not enough the party evicting recover by verdict; but it is enough to assign a breach by one's act claiming an elder title, without stating what that title is; for, as before said, the plt. may not know the ejector's title, and it is sufficient if it any way appears in the declaration his title is elder. And if the breach be by a person included in the covenant, it is not necessary to state any title as to him, and the executors or administrators of the lessor or grantor are included in the covenant.

2 Roll. R. 2,
Force v.
Vines.

§ 10. In the true manner of declaring in this case, the law on the one hand requires the plt. so to state and aver the elder and better title of the disturber, a stranger, as to put it in issue, for without its being in issue and found to exist, the plt. has no cause of action on a general covenant for quiet enjoyment or to save harmless. On the other hand, as the law presumes or considers the plt. has no means of knowing the particulars of the disturber's title, as he the plt. cannot be possessed in common cases of his title-deeds and other evidence of title, or compel him to produce them, the law, which never requires impossibilities or things unreasonable, allows

Foster v.
Pierson.

the plt. to declare generally, and without alleging the particulars of the stranger's title when he is the disturber. But it is otherwise, when he is, in the eye of the law, privy in estate and title with the plt. in regard to the lands or things in question. So any facts stated in the declaration shewing the third person, the disturber, entered on an elder and legal title, is sufficient, though not in formal words.

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Art. 5.

But if there be a covenant to save the lessee harmless from a rent charge, if he pay it without compulsion, he pays it in his own wrong.

2 Salk. 109,
Hannam v.
Redman.

ART. 5. *Covenants to save harmless in the United States.*

§ 1. These covenants in the nature of things must be frequently made in every State, not only by lessors to save lessees, and by lessees to save lessors harmless, but also by principals in bonds and obligations to save their sureties harmless. So by individuals or corporations to save each other harmless and indemnified in a multitude of cases. As there are no statutes in this State, and it is believed in no State in the Union, particularly relating to covenants to save harmless, they rest altogether on the principles of the English common law on this subject adopted here; therefore, the English decisions in relation to this matter are almost universally valid and applicable in this country. If there be any exception to this observation, it is because some statute or practice in this country may indirectly, in some very few cases, affect these covenants; yet covenants to save harmless have been but very rarely sued in this State. No case of the kind has yet appeared in our seventeen volumes of Reports, and scarcely one is recollected in practice.

If a question arise, if the surety, the covenantee, is saved harmless and indemnified in regard to the debt, as to which he is surety, this question is generally answered in the same way and on the same principles as were laid down in the cases of sureties in *assumpsit*. And the same acts of negligence to pay on the principal's part, and the same acts in paying the debt by the surety, that will entitle him to his action of *assumpsit* for monies paid, will entitle him to his action of covenant broken, where he receives the principal's contract by covenant to save him harmless.

§ 2. *Covenant to save harmless may by construction be one for quiet enjoyment*, As where A sells land to B, and covenants to save B harmless on account of a certain mortgage on the land; this by legal construction is a covenant of quiet enjoyment against the mortgage, and B, therefore, cannot sue on it for breach of it, without alleging and proving an eviction under the mortgage, as by it he receives no hurt till evicted &c.

8 Johns. R.
196, Van
Slyck v. Kimball.

CH. 116. ART. 6. *The kind of notice to purchasers which does or does not make conveyances fraudulent, or trusts in equity.*

Art. 6.

§ 1. *General principles.* Whenever, for instance, the legal title and estate is in A, and B has an equitable interest in it, or an equitable claim or lien on it, and C purchases of either A or B, his title will be materially affected by notice of the interest of the other. We have seen in Sutton and Lord, and similar cases, that if A's creditors have an equitable claim on his estate, and he conveys it, to wrong them, to B, who has notice of this claim, his title is bad, and A's creditors can levy on the estate, and in equity B is their trustee; but if B convey to C, who buys *bonâ fide*, for a valuable consideration, and without notice of said equitable claim, his title is good, and in his case there is no fraud or trust. So according to other authority, generally, (though not universally,) if A's creditors have an equitable claim on his property, and to wrong them, he conveys it to B who purchases *bonâ fide*, for a valuable consideration, and without notice, his title is good, and their claim at an end, as to this property; and if B convey to C, who has notice this claim on the property once existed, still C's title is good in law and equity; for equity protects B's estate, as it will carefully protect the estate of every fair purchaser, and C has his estate, and such claim once at an end cannot by an after act be revived.

Wildgoose v. Wayland, Golds. 147.
—Cornwallis' case, Tott. hill, 254.

§ 2. *The kind of notice to the purchase.* This is not mere report or notice to him given by one not interested or concerned in the property to affect the purchaser with notice; it must be real, and from one concerned; but it may be implied. As where A is about buying land of B, and C tells A to take care, for B is only trustee for D, and E says it is not so. A buys, his title is good, though C told the truth. Held, A had no notice. For if vague reports or mere assertions of strangers be notice, all titles would be in danger, and every one's estate be easily slandered. This evidence of notice ought to amount to actual fraud. Per Lord Hardwicke, cited 3 Ves. jun. 486; same rule, 3 Ves. jun. 478, 486, Jolland v. Stainbridge. Therefore a registered conveyance, for valuable consideration, was established against a prior devise not registered, the evidence of notice not being sufficient to prove actual fraud. 3 Atk. 646; Amb. 436. Parol evidence was admitted in all these cases, and in Ambl. 624, Sheldon v. Cox. See Harrison v. Forth, Pre. Ch. 51; 1 Eq. Ca. Abr. 331, Lowther v. Carleton; Forrester, 187; 2 Atk. 242. The chancellor and three judges rather held notice might be implied. Held, one must take notice of a condition annexed to a devise to her, though a minor, where no one is appointed to give notice. In the great case of Fry & ux. v. Porter, 1

2 Atk. 276, Hine v. Dodd.
—See Le Neve v. Le Neve, 1 Ves. 64.—1 Mod. 86, 88, Porter v. Fry, & many cases cited.
—Butcher v. Stapeley, 1 Vern. 363.

Mod. 300 to 314, many cases cited ; *Currens & al. v. Hart*, **CH. 116.**
Hardin, 37. **Art. 6.**

§ 3. The notice to the purchaser must be in the same transaction. Hence if A purchase an estate liable to a charitable use, it is not sufficient notice to him, he once was a party in a legislative debate in which this use was asserted and shewn, but to him only as a legislator. **East Greenstead's case, Duke, 64, 173.**

§ 4. But if the vendee says he has purchased property described, and the vendor is present and silent, this is notice to a third person present and hearing what passed. **3 Ves. jr. 416.** **1 Ves. jr. 425, in Weymouth v. Boyer.**

§ 5. *Constructive notice.* This is evidence of facts from which notice is inferred ; or violent presumptions. Like all constructive notice, it depends too much on circumstances to be reducible to certain rules. **Cases.**

§ 6. Notice to the attorney or agent of the purchaser is notice to him. But recording a deed in a wrong county, required by law to be recorded, is not constructive notice in law or equity, as neither holds any one to look for it in a wrong county. See **12 Johns. R. 140 ; 2 Johns. Ca. 85 ; LeNeve v. LeNeve, Ambl. 438 ; Story v. Lord Windsor ; Taylor v. M'Donald's heirs, 2 Bibb, 420 ; and Heister's lessee v. Fortner, 2 Bin. 40 ; Lyle v. Ducomb, 5 Bin. 585 ; Warwick v. Warwick, 3 Atk. 291, 294 ; Newman v. Wallace, 2 Bro. C. C. 143 ; Jennings v. Moore, 2 Vern. 609 ; Brotherton v. Hall, 2 Vern. 574 ; Ashley v. Baillie, 2 Ves. 368 ; Maddox v. Maddox, 1 Ves. 61 ; 1 Munf. 38 ; Norris v. Le Neve, 3 Atk. 26.** **Astor v. Wells & al., 4 Wheaton, 466, 488.**

§ 7. A public statute is notice ; but a private one is not of itself ; nor if made public, as to pleadings. **3 Bos. & P. 565.** **2 Ves. 480.—Hesse v. Stevenson,**

§ 8. *Lis pendens* and bill filed in a public court, is of itself notice to a purchaser, if not collusive, if so, it binds not. **15 Johns. R. 315 ; Yeavey v. Yeavey ; Walker v. Butz, 1 Yeates, 574 ; 1 Johns. Ch. R. 576 ; Heatly & al. v. Finster & al., 2 Johns. Ch. R. 158 ; Hill v. Worsely, Hard. 329 ; Diggs v. Boys, Tothill, 254 ; Murray v. Ballou, 1 Johns. Ch. R. 566 ; Garth v. Ward, 2 Atk. 174 ; 2 Barnard. Ch. R. 430 ; Sorrell v. Carpenter, 2 P. W. 482 ; 1 Johns. Ch. R. 576 ; 8 Cran. 568.** **227.—1 Vern. 318, 469.—3 Atk. 392.—5 Co. 47.**

§ 9. If A, with notice of any claim, purchase in B's name, without his consent, yet if B assent he is bound by the notice to A. So one is bound by the notice, though he get a conveyance to a third person. **1 Eq. Ca. Abr. 330 ; Coote v. Mammon, 5 Bro. P. C. 355 ; Nels. Ch. R. 59.** **Merry v. Abney, 1 Ch. Ca. 38.—1 Bro. C. C. 351.**

§ 10. "Where an agent has been employed for a person in part, and not throughout, yet that affects a person with notice." **2 Eq. Ca. Abr. 682.** Per Lord Hardwicke. But this notice to the agent or attorney must be in the same transaction. **Bury v. Bury ; Pres-**

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§ 11. Decrees of courts of equity are not of themselves notice to the purchaser. See Wattington v. Howley & al., 1 Desaus. Ch. R. 170. Nor are judgments, but a decree, part of the *lis pendens*, is as to account &c. Worsely v. The Earl of Scarborough, 3 Atk. 392. Docketing of judgment of itself is not, 2 Ch. Ca. 47 ; and Do. 170, Griswold v. Marsham ; 2 Eq. Ca. Abr. 682 ; for judgments are infinite, Id. So are the authorities generally, but not in all cases.

Harvey v. Montague, 1 Vern. 67.—1 Ch. Ca. 37.—Ambl. 164.—Morecock v. Dickins, Ambl. 678.

§ 12. It is said by some, that the registration of a deed is not of itself notice to a purchaser. The point is unsettled in England in equity. See Bedford v. Backhouse, 2 Eq. Ca. Abr. 615, pt. 12 ; Sugden, 506 to 509, & 538, 539. There we find there have been different opinions. But opinions there on this subject of registering deeds are of but little value in the United States : 1. Because in England it has been but little in use, and not much understood : 2. It has there been truly observed that the Middlesex registry act (on which most of the opinions have been given,) does not give any new operation to a deed when recorded, though it declares the effect of omitting to register : 3. The Massachusetts register acts, and those in most of our States, expressly, or by fair construction, make our deed legally registered as much notice to all the world as livery of seizin formerly was ; and that was clearly notice to every body. From our statutes and decisions we may well infer that our deed registered, as by law required, is notice to all the world, as was expressly decided in Marshall v. Fisk, Ch. 104, a. 3, s. 13, and in other cases ; even if only a mortgage deed. See Ch. 112, a. 2, s. 9 ; and the point examined, Ch. 109, a. 7. Entries and surveys on the Virginia land laws, notice &c. (6 Wheaton, 550, 565, Kerr & al. v. Watts,) to purchasers of military Virginia land warrants.

§ 13. Any matter sufficient to put a purchaser on inquiry is good notice to him ; as where he sees one in possession acting as a man having or claiming title ; as a public registry of titles, making registration essential to their validity, or any other circumstance that reasonably excites inquiry. See Smith v. Low, 1 Atk. 489 ; 2 Bin. 466 ; Hiern v. Mill, 13 Ves. jun. 114, 121, information to a purchaser one has title deeds as security is notice. So is being told part of the estate is possessed by a tenant. Taylor v. Stibbert, 2 Ves. jun. 440. So a tenant's possession. 16 Ves. 249, Daniels v. Davidson ; 17 Ves. jun. 293, 433 ; Allen v. Anthony, 1 Mer. 282 ; see Bisco v. Bunbury, 1 Ch. Ca. 287 ; Moore v. Bennett, 2 Ch. Ca. 246 ; Mertins v. Jolliffe, Ambl. 313 ; Willis'

lessee *v.* Bucher, 2 Bin. 466. So a necessary deed leading to a fact in the title, is notice. *Tanner v. Florence*, 1 Ch. Ca. 25; *Hall v. Smith*, 14 Ves. jun. 426; 16 Ves. jun. 429; but *Campbell v. Irvine*, 6 Bin. 119; 1 Dallas, 67; *Kenny v. Browne*, 3 Ridgw. P. C. 512; 17 Ves. jun. 293; *Mocatta v. Murgatroyd*, 1 P. W. 393. Being a witness to a deed is not notice of itself. *Mocatta's case*; *Read v. Williams*, 5 Taun. 257; *Holmes v. Custance*, 12 Ves. jun. 279; *Welford v. Beezely*, 1 Ves. 6.

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§ 14. One witness only, swears notice to the deft., and he positively denies it, no decree against him. *Mortimer v. Orchard*, 2 Ves. junr. 243; 1 Vern. 161; 6 Ves. jun. 174; 3 Ch. Ca. 123; *Cooke v. Clayworth*, 18 Ves. 12; *Bright's heirs v. Haggin*, Hardin, 536; *Heffner v. Miller*, 2 Munf. 43; must deny all notice, *Wilkins v. Woodfin*, 5 Munf. 184; 3 Atk. 650; *Pilling v. Armitage*, 12 Ves. junr. 78; 1 Smith, 213; 2 Desaus. Ch. R. 143.

§ 15. Forms of declarations, pleas, &c. referred to. On an indenture between plt. and deft., by which the deft. leased to the plt. certain premises for one year; and at the expiration thereof for the plt's. natural life, from year to year, except the last day of the year, so long as the deft's. estate should continue, without interruption from her, or any person lawfully claiming; breach that one T. T. lawfully claiming, hindered and kept her out of possession, with averment of special damage. 5 Wentw. 53, 56. Another case of quiet enjoyment, interruption by persons claiming common, 56, 60; declaration lessee interrupted in his enjoyment of a dock &c., 60, 63; by ground rent in arrear, 63, 65.

CHAPTER CXVII.

COVENANT TO REPAIR AND PAY RENT.

ART. 1. *General principles.*

§ 1. These are of the same nature; the lessee expressly engages to repair the estate of another, or to pay him rent for the use of it. Pleas, Ins. Cl. 32, 36.

§ 2. In covenants to repair, the meaning is to deliver up in as good repair or plight as the lessee received the premises; 1 Esp. 327.—
3 Wood's
Con. 550, 583.

CH. 117. but this covenant or meaning does not extend to ordinary or
 Art. 1. natural decay. And when there is this covenant on the lessee's
 ~~~~~ part, and he pulls down houses, or suffers them to decay, no  
 action lies against him till the end of the term, for before  
 that time he may repair them; "but if he cut down timber  
 or other trees, covenant lies immediately, for such cannot be  
 replaced in the same plight at the end of the term."

§ 3. A general covenant to repair, and to deliver up in re-  
 pair, shall extend to all erections or buildings that shall be  
 raised during the term on the land, as they became parts  
 of it. Where rent may be apportioned, lease failing as to part.

§ 4. On the lease of three messuages for forty years, the  
 lessee covenanted "to build three houses in the room of those  
 then standing; to maintain the houses to be erected, and to  
 deliver them up in sufficient repair." The lessee erected five  
 houses, and at the end of the term left one of them out of  
 repair. It was held, that an action of covenant lay; for the  
 covenant to leave in repair extended to all the houses erected  
 on the land.

§ 5. It has been decided, that if the lessor covenant to re-  
 pair during the term, and will not do it, the lessee may repair  
 and pay himself by way of retainer. Though Holt C. J.  
 doubted if this could be done.

§ 6. In this case the court held, that if the covenant be,  
 "it is agreed, that the lessee shall keep the house demised in  
 good repair, the lessor putting it in good repair," covenant lies  
 against the lessor on these words, if he do not put it in repair.

§ 7. Covenant on covenant to repair, against the adminis-  
 trator of the assignee of a term generally in his own name.  
 The covenant to repair was in the original demise, and the  
 breach in his time; and it was agreed: 1. That his covenant  
 run with the land, and bound the possessor without the word  
*assigns*; and the administrator should not be allowed to plead,  
 he ought to be charged for his own wrong for want of assets;  
 and as he is charged for the rent in his own time, *de bonis  
 propriis*, so he ought to be for the damages.

§ 8. This was an action of covenant on a covenant in a  
 lease for not repairing certain demised premises. The plea  
 was, that the plt. before the cause of action accrued, entered  
 and pulled down the premises, and expelled the deft. The  
 plt. replied, that she did not expel, amove, or hold out, the  
 deft., from the said kiln, (the part particularly out of repair,)  
 in manner and form as the deft. had alleged. The deft. de-  
 murred, and shew for cause of demurrer that the plts., by  
 their replication, put in issue matters not issuable, or triable  
 by a jury, and that the replication was insufficient &c. Judg-  
 ment for the plts.; for it is a matter traversable. The expulsion

2 Maule & S.  
255.

1 Esp. 328,  
Douse v.  
Earle, 3  
Lev. 264—3  
Wood's Con.  
682—Hob.  
234.—Skin.  
121.—1 Vent.  
128, 125.—3  
Inst. Cl.  
479.

1 Esp. 328,  
Beale v. Tay-  
lor.

1 Esp. 328,  
Prettyman v.  
Thomas.

12 Mod. 371,  
Keeling v.  
Morrice.—6  
Co. 15.—1  
Cro. 229.—2  
Inst. 302.

Willes, 129,  
Hodgskin &  
al. v. Queen-  
borough.

here is the only fact material. "Neither the entry nor pulling down is an expulsion;" and the expulsion only is an excuse for not repairing. CH. 117.  
Art. 2.

§ 9. *Covenant to leave in repair.* This was an action on a covenant in a building and repairing lease, "to leave the demised premises with all new erections well repaired." And it was construed to extend to *new erections only*; a sum of money being agreed to be laid out in new erections and rebuilding; and the covenant to keep in repair "extending only to *new erections*." This was an action by the heir of the reversioner against the administrator of the assignee, and it was understood that the old buildings were to be pulled down.

§ 10. It is a general principle that a mere entry into part without any expulsion, does not suspend the repairs. As where the lessor entered into a back yard of a messuage. Held, this did not suspend the covenants to repair, as the lessee still remained in possession of the messuage; but it was said in this case, "the rent is suspended by an entry into any part." But on this point see Entry and Eviction in another article.

**ART. 2. Casualties by fires, tempests, &c. as to repairs.**

§ 1. In this case the lessee covenanted to repair, &c. "casualties by fire and tempest excepted." The court doubted if the landlord was bound to repair in any of the excepted cases. But it has been decided, that if the fire come from the lessor's chimney and burn the house demised, the lessee is not bound to repair, for the loss and accident comes by the lessor's act.

§ 2. So it has been decided, that a lessee on a covenant to repair, generally is bound to repair, though the buildings be destroyed by accidental fires &c.; and so is the assignee. In this case one plea was, that the rent was paid, and issue. Another plea, that on the 20th of September 1794, "the house was burnt by accident, and against the will and without the default of" the deft., or his servants or family, named, by means of a fire which accidentally broke out in an adjoining house, and so communicated from that to the house in question, which was burned down and destroyed, and has not since been rebuilt &c. To the second plea there was a general demurrer; for the plt. were cited *Paradine v. Jane*, Allen, 27, the next case; the court held, the plea bad, and said, "if the lessee covenant to repair a house, though it be burned down by lightning or thrown down by enemies, yet he ought to repair it."

§ 3. In this action the court decided, that though a foreign enemy dispossessed the lessee of the estate, he is bound to repair. And *Dyer*, 33 a, is cited a case in which the court took a distinction between a covenant to repair under a pen-

1 Burr. 287,  
Lant v. Norris.

Bul. N. P.  
165, Snelling  
v. Stagg.

6 D. & E. 488,  
Wagnall v.  
Waters —  
3 Wood's  
Con. 682.

6 D. & E. 650,  
Bullock v.  
Dommitt. —  
4 Wood's  
Con. 631. —  
2 Roll. Abr.  
450. — 3 Com.  
D. 236. —  
1 Cruise, 257.

Allen, 27,  
*Paradine v.*  
*Jane.*

CH. 117. alty and a covenant for non performance &c., saying the lessee Art. 2. is excused from the former by the act of God, as by thunder or tempest, but not from the latter.

Com. R. 626,  
Chesterfield  
v. Bolton,  
cited 1  
Cruise 79.

§ 4. This was an action of covenant for not repairing, on a general covenant to repair, to which the deft. pleaded, that the house was burnt down by accident; and the court held, that the lessee was bound to rebuild, and judgment for the plt. on demurrer.

§ 5. And in *Bullock v. Dommitt*, Lord Kenyon said, the cases of *Paradine v. Jane* and *Chesterfield v. Bolton*, had always been considered as law, and added, that "on a general covenant like the present, there is no doubt but that the lessee is bound to rebuild in case of an accidental fire; the common opinion of mankind confirms this, for in many cases an exception of accidents by fire is cautiously introduced into the lease to protect the lessee." Also cited 40 E. III. 5; 2 Saund. 420, *Walton v. Waterhouse*; 3 Keb. 40; 3 Inst. Cl. 510; *Style*, 162.

2 Saund. 420,  
*Walton v.*  
*Waterhouse*,  
cited *Hill v.*  
*Bolton*.  
6 D. & E. 750,  
*Pritchard's*  
case.

§ 6. So in this case the court held, that if the lessee be bound to repair, and the houses be burnt by lightning, he is bound to rebuild, and in his plea he must shew who rebuilt.

§ 7. So on a covenant to build a bridge in a substantial manner, and to keep it in repair for a certain time, it was held, the party was bound to rebuild the bridge, though broken down by an extraordinary flood: and the above cases were cited for the plt.; for the deft. were cited *Sir W. Jones*, 179, *Williams v. Lloyd*; *Palmer*, 548; 10 Co. 139 a, in *Knightley's case* it was resolved, "that if one be bound by prescription to repair a sea-wall, and keep it in good repair of such height, and as sufficient as it was accustomed, and by a sudden and unusual increase of water, salt or fresh, the walls are broken or the water overflows them, he is not bound to rebuild them, &c. for no fault in this case was in him who ought to repair it." But it may be observed, that one is often bound to fulfil his express contract where he is in no fault. In this case of *Bullock v. Dommitt*, *Wood* said the true distinction was in the books, "when the law creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him; but when the party by his own contract, creates a duty or charge upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity; because he might have provided against it by his contract; and, therefore, if a lessee covenant to repair a house, though it be burned by lightning or thrown down by enemies, yet he ought to repair it."

3 Wood's  
Con. 644,  
583.—*Dyer*,  
32, 33.

§ 8. But if the lessee be bound to repair sea-banks on a penalty, and they are beat down by a sudden flood, he is excused the penalty, but must repair the banks.

§ 9. In chancery held, a tenant is bound to repair in case of fire, being bound to leave the premises in good repair, and there is no exception of casualties. 3 Ves. jr. 38, Pym v. Blackburn. CH. 117.  
Art. 2.

This case had been considered by some as establishing a contrary doctrine, but does not in fact when examined. In this case it was resolved, if the condition of a penal bond be of two parts in the disjunctive, and both possible at the time, and then one of them becomes impossible by the act of God, the obligor is not bound to perform the other, for the condition is for his benefit, and to be taken beneficially for him. He had his election to perform the one or the other to save the penalty. When one is become impossible by the act of God, it is as beneficial for him as if that part had been the only condition of the bond, *quia impotentia excusat legem*. The same case is reported in Cro. El. 298. Now it will be observed, that in this case the condition was for the obligor's benefit; and the construction given was to avoid a penalty; and in the above case of the sea-banks the party was excused the penalty, but held bound to repair. 5 Co. 22,  
Laughter's  
case.

§ 10. So in a promise, if the party be disabled by the act of God before breach, he shall be excused. As if I lend my horse to B, and he promises to return him on request, and before a request is made the horse dies; in this case the horse being my property, and dying by mere accident, it is reasonable enough that I lose the property. But as it was said in the case of *Paradine v. Jane*, as the lessee is to have the casual profits, it is but reasonable he bear the casual losses. 3 Com. D.  
109.

§ 11. So in this case the court said, if a house be burnt by lightning or overthrown by tempest, without the lessee's fault, it is no waste, nor is it a tortious act; this may be true, yet by express covenant he may be bound to repair. 10 Co. 139,  
Knightley's  
case.

§ 12. So if A covenant to repair houses or to sustain sea-banks, or to leave them in as good condition as he finds them, and the houses be burnt or thrown down by tempest, or the sea-banks by a sudden flood, the covenant is not broken by this accident only, but if A do not repair the houses or banks in convenient time, the covenant will be broken; and if A throws down the houses, no action lies till the end of the term, for till then he may rebuild or repair. And if one covenant to repair a house before a certain day, and the plague be in it, so it is not done, the covenant is not broken, but then it must be done in convenient time afterwards, or the covenant will be broken. 3 Wood's  
Con. 542,  
584.—Co. 98.  
—Dyer, 33,  
98.—Plow.  
229.—4 Ed.  
III. 5.

§ 13. If the lessee covenant to repair all at his own expense, and cut timber therefor on the leased premises, it is a breach of his covenant. Dyer, 98.

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## Art. 3.

3 Wood's  
Con. 544,  
589.

3 Wood's  
Con. 583.—  
3 Inst. Cl. 50.  
—1 Co. Shel-  
ley's case.

Left, 43.

Willes, 146,  
Mucklestone  
v. Thomas,  
ex'x.

§ 14. Where the lessee covenants to repair and the lessor grants his reversion to A, he shall recover damages for the lessor's not repairing; but only from the time of this grant of the reversion; and by his recovering damages the lessee is forever excused after repairing, and the covenant is extinct.

§ 15. So if one covenant to leave a wood in the same plight he finds it, and he cuts down trees, the covenant is broken presently, but if blown down by tempest, it is otherwise, for now it is become impossible by the act of God, and the covenantor is not bound to supply it.

§ 16. Action against a tenant for breach of covenant in not repairing the demised premises. Plea, the landlord did not assign him materials, is bad; for he should have shewn he asked, and so pleaded that there were none proper to which he had a right; for this is putting the issue not upon the fact, but upon the law.

§ 17. Covenant on an indenture of lease against the deft. as executrix of John Thomas, for not repairing &c. The plt. leased to him a house &c. from May 1, 1720, for twenty-one years; he covenanted for himself and heirs &c. to pay rent, and on or before June 1, 1720, to repair the house &c. "5000 slates being found, allowed, and delivered on the said premises" by the plt. towards the repairs; and the testator also covenanted for the executors &c. to keep in repair, (fire excepted,) he entered May 1, 1720, and died April 7, 1734, possessed, and the deft. as his executrix entered and remained possessed; plt. seized of the reversion; and she being possessed &c. suffered the premises to be out of repair &c. She pleaded the plt. had not, any time after making the indenture, found &c., said 5000 slates, or any of them, &c. Plt. demurred generally, and had judgment. Court was rather of opinion that the finding of the slate was a covenant, and not a condition precedent. But the court said, the testator, for any thing that appeared, might have repaired before June 1; if so the deft. was certainly bound to keep in repair, and if he did not so repair, the deft. should have pleaded this, the testator did not so put the premises in repair, by reason that the plt. did not find the slates, hence she was not obliged to keep them in repair.

ART. 3. *Covenant to pay rent, and casualties by fire, &c.*

Sundry pleas,  
4 Inst. Cl. 19,  
32, see debt  
for rent.

Stra. 763,  
Monk v.  
Cooper.—2  
Ld. Raym.  
1477.—Dec-  
laration in  
covenant for

§ 1. In this, as in covenant to repair, the lessee is not discharged by an accidental destruction of the leased premises by fire, lightning, &c.

§ 2. Therefore in covenant for non-payment of rent, on oyer of the lease, (in which was a covenant on the lessor's part to repair, except the premises should be demolished by fire,) the plea was, that the premises were burnt down against

not paying rent, 3 Went. p. 317.

the lessee's will, and not rebuilt by the plt., the lessor, during the whole year, for which he demanded rent, nor had he any enjoyment of the premises, and prayed judgment if he ought to be charged with the rent. To this plea the plt. demurred. Judgment for the plt. And the court said, the case in *Allen* is expressly in the plt.'s favour. And if the deft. has received any injury by the lessor's not repairing, he will have his remedy; but he cannot set it up against the demand for rent.

CH. 117.  
Art. 4.

§ 3. In this case it was adjudged, if the lessee covenant to pay rent, and also to repair, with express exception of casualties by fire *quoad* repairs, he is liable in an action of covenant for rent, though the premises be burnt down by fire and not rebuilt by the lessor after notice and request to rebuild. In this case again, those of *Paradine v. Jane*, and *Monk v. Cooper*, are recognized to be law. This liability was till lately doubted in equity; but in *Hare v. Groves*, 3 Anstr. 687, settled he was liable to pay the rent, for reason stated, post; New. on Con. 325; *Brown v. Quilter*; *Steele v. Wright*.

1 D. & E. 310,  
Belfour,  
admr. v. West-  
on.

Harrison v.  
North, 1 Ch.  
Ca. 83.

#### ART. 4. *Sundry English cases for rent.*

§ 1. It has been decided, that in covenant for non-payment of rent, the deft. cannot plead that it has been levied by distress; for that is a confession it was not paid at the day, but he may plead nothing in arrear, or payment at the day.

Bul. N. P. 166.  
5 Com. D.  
611.

§ 2. In this case it was adjudged that the assignee of the reversion may bring covenant for arrears of rent due before he granted the reversion over.

12 Mod. 45,  
Midgley v.  
Lovelace.

§ 3. A forfeiture may be waived by the acceptance of rent. As where the lessee covenanted not to underlet the premises, without the lessor's consent, under his hand and seal, with a power of re-entry reserved to the lessor in case of a breach; the lessor accepted rent due after he knew the condition was broken, and it was held by the court that this was a waiver of the forfeiture, though urged that this could not be without consent, under hand and seal; the court said, this was evidently the intention of the parties, and the lessor's conduct shewed he meant the lease should continue. See post, covenant how discharged; and 4 Cruise, 137. Acceptance of rent is however an equivocal act if after forfeiture, and may or may not waive the forfeiture according to circumstances,—the *quo animo*. 3 Hen. & M. 436, *Jones' devisee v. Roberts*.

Cowp. 803,  
806, Good-  
right v. Da-  
vids.

§ 4. In this case it was adjudged in the Court of Common Pleas, and confirmed in error in the Kings Bench, that the bankruptcy of the lessee does not discharge him from an action of covenant for rent, becoming due subsequently to the bankruptcy. Nor is the lessee discharged on his express covenant, though the lessor accept rent of the assignee of the lessee. And if in this case the law take the estate from the

4 D. & E. 94,  
Auriol v. Mills  
in error.—  
Same princi-  
ple, New-  
York insolv-  
ent act.—9  
Johns. R. 127,  
cited 1 J. hns.  
Ca. 73.—8  
East, 318.

**Cn. 117.** lessee and assign it over; still he is liable on his express covenant, as it respects acts to be done after the bankruptcy. See *Art. 4.* Ch. 123, a. 3, s. 10.

*Dougl. 183,*  
*Holford v.*  
*Hatch.*

§ 5. After much consideration in this case of Holford, lessor, against Hatch, called assignee of one Saunders, the lessee, it was resolved, that the lessor cannot maintain an action of covenant for rent against an under-tenant. The deft's plea was, that all Saunders' estate in the premises did not come to him by assignment thereof in manner and form as the plt. had alleged; the deft. was in possession, but they were conveyed to him for a day or some days less than the original term, and he had actually surrendered them before the action was brought. The plt. had received some rents "of Saunders by the hands of Hatch."

*Dougl. 466,*  
*Eaton v.*  
*Jaques.*

§ 6. *Term mortgaged, &c.* If a term be assigned by way of mortgage, with a clause of redemption, the lessor cannot sue the mortgagee as assignee of all the estate, right, title, and interest of the mortgagor, even after the mortgage has been forfeited, unless the mortgagee has taken actual possession. In this case the plt. declared, that all the estate, right, and interest, of the original lessee, (the mortgagor,) came to and vested in the deft., by assignment thereof, and he became possessed thereof. The deft. pleaded, that all the estate &c. (in the words of the declaration,) did not come to and vest in the deft. by assignment thereof, and that he was not possessed of &c., in form &c., and issue was joined.

*3 Inst. Cl.*  
*512.—Style,*  
*248, Page v.*  
*Parr.*

§ 7. This was an action of covenant on a lease by indenture for not paying rent. The deft. pleaded, that the plt. entered into part before the rent became due, sued for, and so he had suspended it. The plt. replied, that the deft. did re-enter, and was possessed as in his former estate. And the court adjudged this replication bad, because it did not shew the deft. continued the possession till the rent became due. Held, also, that the plea in bar was a good one, for the lessor cannot enter into part and apportion his own rent. Plt. admitted he interrupted the lessee for a time.

*Dougl. 452,*  
*Barnfather*  
*v. Jordan &*  
*al.*

§ 8. This was an action of covenant on covenant, for rent against an assignee of a term; and the court held, that he might plead an assignment to a *feme covert* before the rent accrued; for an assignee is liable for rent to the lessor but on privity of estate, and that ended by the assignment to her.

*2 Saund. 182,*  
*Devereux v.*  
*Barlow.*

§ 9. In this case it was decided in debt for rent, that if the lessor refuse to accept an assignee for his tenant, and gives his receipts in the lessee's name, and then brings debt against the assignee for rent, he may maintain this action, for he may refuse him when he will, and accept him when it suits him,

and may sue the lessee or assignee for rent, at his election,—one on contract, the other on privity of estate. CH. 117.  
Art. 4.

§ 10. So when the lessee assigned a moiety to the assignee, it was held, that the lessor might have an action against him for a moiety of the rent. Must mean during the time the assignee occupied and enjoyed the moiety. 2 Saund. 182.  
—2 Lev. 231.  
—Sir Thos.  
Jones, 104.

§ 11. So if the lessee of lands assigns over, and the lessor accepts the assignee as his tenant, he cannot have debt for rent incurred after the assignment, but may bring his action of covenant on the express covenant made by the lessee to pay rent. An entry before the commencement of the lease will not avoid payment of the rent reserved. 2 Saund. 303,  
Gover's case.  
1 Stra. 550.

§ 12. Covenants both to *pay rent and repair*. An action of covenant was brought, and a breach assigned for not paying rent due, and also for not repairing. The bar as to the rent was, that the plt. had accepted £5. 5s. in full satisfaction, and *hoc paratus*. A second plea was as to the repairs, a plea pleaded by the deft., that he, from time to time, did repair in a reasonable and convenient time; and traversed, the premises were not repaired: and *hoc paratus*. The replication as to the rent was, that he, the deft., did not pay £5. 5s. in manner and form as alleged: and issue. And as to the repairs the plt. pleaded *precludi non*; because, as he said in his declaration, the said messuage, garden, stable, &c. were unrepaired in manner and form as he had declared: and issue. In this case subjects in one action became totally distinct in the pleas and issues. Here several breaches were assigned, one in not paying rent, and another in not repairing. And where several breaches are assigned, the deft. may answer them distinctly, as if several actions, even plead to issue to one, and demur to another, as post. See 1 Saund. 108. 4 Inst. Cl.  
133, 135.—1  
Selw. 347.

§ 13. The lessee may bring debt against the assignee for rent on the privity of estate between them, by virtue of the assignment: and so of a part,—s. 10 ante. 2 Saund. 303.

§ 14. So it has been decided, that the devisee of a reversion shall have an action of covenant for rent to be paid to the lessor, his executors, administrators, or assigns, during the term. How to declare, 1 Ch. on Pl. 303. And had it not been devised it would have gone to the heir. 2 Saund. 367,  
Sacheverell  
v. Froggatt. \*  
—3 Cruise,  
320.

§ 15. Covenant for rent on an indenture sued by assignee of the lessor, a bankrupt. Held, the lessee cannot plead that the lessor had nothing in the land. See 6 D. & E. Wilkins v. Wingate. 7 D. & E. 537,  
Parker & al.  
v. Manning.

§ 16. *An unusual covenant, void*. See Doe v. Sandham. Under a power for a tenant for life to make leases for years, and reserving the usual covenants &c., he made a lease, containing a proviso, that in case the premises were blown down, 1 D. & E. 705,  
710, Doe v.  
Sandham.

CH. 117. or burnt, the lessor should re-build, otherwise the rent should cease, is void,—the jury find that such covenant was unusual.

Art. 5. Held also, the lease was void, because the power to lease extended only to the usual covenants, and this lease by the power extended beyond the lessor's life. The manner of declaring for rent, *Buckley v. Kenyon*.

10 East, 139.

ART. 5. *American cases.* § 1. As covenants to repair and pay rent are altogether contracts at common law, of course their principles are the same here as in England; and a few American cases will be stated to shew how entirely we proceed in these respects on British authorities, as to both rights and pleadings. These few will be stated with some minuteness.

1 Dallas, 210,  
Pollard v.  
Shaaffer, as-  
signee of the  
lessee. Su-  
preme Court.

First. This was an action of covenant, on a covenant to repair buildings in Philadelphia, and to deliver them up in good repair at the end of the term. And the court decided, that this covenant as to repairs did not extend to the acts of an enemy in war; but that such covenants run with the land, "and bind the assignee as much as lessee, even if the assignee were not named by express words, on account of the privity." Though rent must be paid, the act of such enemy is not waste. Were cited 5 Co. 16, *Spencer's case*; 1 Salk. 199; 2 Levinz, 206; 1 Bac. Abr. 534, and other authorities.

The court decided, 2d. That "equity is part of the law of Pennsylvania," where there is no court of chancery; and no authority in England or in Europe is to be found to shew that destruction by an enemy is waste. Doct. & Stud. lib. 1, c. 16; 1 Chan. Ca. 141; *Wood's Inst.* 4.

Third. The court also held, that the deft. was bound to pay the rent, because of the express covenant to pay; because a sum certain, and the extent of the loss known. He was to have casual profits during the term, so ought to bear casual losses, and not lay the whole burden on the lessors. *Allen*, 27; 1 Co. 81, *Corbet's case*.

Fourth. But that the deft. is not liable on the covenant to deliver up in good repair the premises on the first of March 1778, because a covenant to do this against an act of God or an enemy, ought to be special and express, and so clear that no other meaning can be put upon it; because the deft. had no consideration, no premium for this risk, and it was not in the contemplation of either party; and because equality is equity, and the loss should be divided. The deft. loses the profits during the term, and the plt. the loss done to the permanent buildings (a sugar-house &c.) during the term, neither party has been guilty of any fault, the injury has been done by a common enemy, whom both together could not possibly resist or prevent, and the plt. would have been thus damnified had

he possessed the buildings. And neither expected the lessee to be answerable for the acts of God or of public enemies; and whenever waste is solely by lightning, flood, tempest, or enemies, the lessee is not liable. Further authorities cited for the plt. Doct. & Stud. 124; Style, 47; Comyns' R. 631; 2 Stra. 763, Monk v. Cooper; Plow. 290; Perkins, 738; 2 Saund. 420; 2 Vern. 280.

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Fifth. For the defts. "Express covenant in this case does not bind against acts of God or enemies, but only against all other events;" "because such acts were not in the contemplation of the parties at the time of the lease executed;" this was urged by the defts.'s counsel. The authorities they cited were, Lord Raym. 909; 4 Bac. Abr. 369, 370; 1 Rol. Abr. 236; Dyer, 33, 56; 1 Bl. Com. 252, 268; 2 Bl. Com. 379; 3 Bl. Com. 153, 157; Cowper, 9, 600; Douglas, 190; 1 Com. D. 150; Vin. Abr. 474, pl. 1; 3 Chan. R. 44, 79; 3 Burr. 1240, 1637; Sir Tho. Raym. 464, 1 Co. 98; 6 Vin. 407; 1 Chan. Cases, 72, 83, 84, 190; Vaughan's R. 119, 122; Doct. & Stud. 126; all English authorities.

§ 2. This was an action of covenant broken on a lease of a chocolate-mill in Danvers. In it both rights and pleadings are material.

Mass. S. Jud.  
Court, Nov.  
1809, Essex,  
Samuel  
Fowler & al.  
v. Glover &  
al.

Facts. November 3, 1806, the plts. in consideration of the defts., covenants, covenanted with them "to build a chocolate-mill on the middle sluice-way where the old wheat-mill stood," at the new mills, thirty-three feet long and twenty-four wide, two stories high, so described the building. The plts. then leased the mill to the defts. for six years from the plts'. completing their part in it. The defts. on their part covenanted and engaged to pay \$300 a year rent, and quarterly, for the leased premises. The plts. covenanted the defts. should quietly enjoy against all lawful claims, they paying rent as aforesaid, the defts. at the end of the term "to surrender the said premises in good repair, unavoidable accidents and common wear and tear excepted;" the covenants were mutual and independent. January 9, 1807, rent commenced and defts. took possession; February, 2, 1807, this chocolate-mill was burnt, but not the ground works below the sills; the defts. never offered to give up their lease. In 1807, the plts. sued for the first quarter's rent \$75; June Term 1807, the action was carried to the Supreme Judicial Court by demurrer, the action was settled, and the \$75 and costs paid. 1808, the plts. sued for \$225, three quarters' rent of one year. Action demurred &c.

Defts'. pleas: 1. Prayed *oyer* of the indenture of lease declared on, being read, &c. *actio non*, protesting the plts. had not performed &c., for plea say, the plts. have never built a

CH. 117. chocolate-mill on the middle sluice-way where the old wheat-mill stood at the new mills aforesaid, according to the force and effect of the said indenture, and issue to the country.

Art. 5.  
By Story & Prescott.

2d plea, protesting the plts. have not well performed, say, that after the commencement of the said supposed demise, and before the said \$225, or any part thereof became due, to wit : on the first day of January 1807, the plts. entered into parcel of the said land, describing the part, and expelled the defts. from the occupation and possession of them, and them so expelled and amoved have held out against the form and effect of the said indenture ; *hoc paratus &c.*

3d plea ; *actio non*, protesting as above, say that after the commencement of the said supposed demise, and before the said \$225 or any part of it became due, to wit : on ——— 1807, the demised premises with the appurtenances, against the will, and without the default of the defts. were burnt and consumed with fire, whereof the plts. then afterwards had notice on the same day, and were then and there requested by the defts. to rebuild the same ; and further say, the demised premises or any part of them are not rebuilt ; and that the defts. from said ——— day of ——— 1807, hitherto have not had, or could have and enjoy any use, benefit, or occupation of the demised premises ; *hoc paratus &c.*

Replications, to the first plea, did build &c. and issue, and found for the plts.

2d. Did not evict, and issue, and found for the plts : 3d. Did not request, and issue, and found for the plts.—Dane & Putnam for the plts.

Motion in arrest of judgment by the defts. mainly for two reasons, or on two grounds : 1. That issue joined on the request to rebuild in the third plea, was immaterial and bad, and so a repleader &c. would be proper : 2. Issue being on their request, the plts. admitted the mill was burnt without any default in the defts.

The general question in the case was, if an action of covenant, on an express covenant to pay rent, was barred by the buildings' being burnt by accident. [Arguments as to pleadings omitted.]

In respect to the main question, is the lessee liable to pay rent, on a general covenant, accrued after the building is burnt by accident and without his fault, the plt. read the cases of *Paradine v. Jane*, *Monk v. Cooper*, *Belfour v. Weston*, *Pollard v. Shaaffer*, *Chesterfield v. Bolton*, *Bullock v. Dommitt*, and *Pritchard's* case, all before stated. Plt. also read 1 *Fonblanque*, 376, in notes, where held, that a lessee having contracted to pay rent, is not discharged by the destruction

of the premises, casually, by fire. *Paradine v. Jane*, approved. CH. 117.  
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*Doe v. Sandham*, 1 D. & E. 705, in which some cases in chancery were cited to the contrary; but on which Buller J. observed, that "a lessee is obliged to pay rent, even though the premises should be burnt down;" "those cases in equity therefore must have turned on some particular circumstances." Also, 2 Com. D. 4 D. 10, Chancery. If a bond be given to pay rent for a wharf, which becomes surrounded with water, he shall be relieved against the penalty of the bond, but not against the rent. Also *Weigal v. Waters*.

Authorities cited by the defts., Rol. Abr. 236, where it was held, when a piece of the land was overflowed, the rent should be apportioned.

*Dyer*, 56, lease for years of cattle &c., some died without any fault of the lessor or lessee; rent apportioned. Court not agreed. *Ambler*, 619, A. D. 1764, *Brown v. Quilter*, the Chancellor held, the lessee is not bound to pay rent after the house is burnt. 1 D. & E., in said case of *Doe v. Sandham*; was a case cited by counsel of a house burnt; and held, the tenant was not bound to re-build or to pay rent. *Steele v. Wright*, 1 D. & E. 708; *Cutter v. Powell*, 6 D. & E. 323; and some few other cases; but the weight of the authorities was decidedly in favour of the plts., who had judgment.

In *Hare v. Groves*, the court gave several substantial reasons for charging the tenant on his express covenant for rent accrued after the house was burnt by accident: 1. That when the parties made the contract, they noticed destruction by fire, and if intended, it was easy to insert a provision against paying rent after burnt &c.; this was not done: 2. The lessee expressly had contracted to pay the rent during the term at all events, and it is difficult to say that was not the intention: 3. This is very different from the case of penalties relieved against in equity, the ground of which is, the actual payment of the penalty was not the intention of the parties: 4. By the misfortune which has happened, both parties are damnified; the lessee is owner of the house during the term, and the lessor after its expiration; by the fire each has lost his interest in it: 5. What reason is there for throwing the whole burden on one of the parties, whose equity is certainly equal to that of the other? This decision, and these reasons, seem to have been decisive on this long contested ground. 6. It may be added, it is a dangerous excuse to be admitted for not paying rent, especially if the tenant occupy himself and this building is burnt by his own fire; because if by design, detection is impossible generally, and a rent become great is a very strong

*Hare v.  
Groves.*

CH. 117. temptation to burn by design to get rid of such rent or any other heavy burden.

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2 Johns. Ca.  
17, Van Rensselaer's exrs.  
v. Platner's  
exrs.

§ 8. If A grant lands to B, his heirs, executors, and administrators, forever, reserving an annual rent, which B, for himself, his heirs, executors, &c. covenants to pay, and A devises his estate to C, A's executors cannot recover rent that accrued after his death; but may rent due before his death; as *quoad* this the right of action accrued to him in his life time, it passed to his executors; not so as to rent accruing after his decease: 2. It is said, covenant in this case lies against B's executors; this may be true if intended of rent that accrued in his lifetime, and to pay which he became liable, though the land passed by operation of law into other hands; for the action he was liable to at his death, on his covenant, after it his executors became liable to; but it is conceived it cannot be true, if meant of rent accruing after his death, and the lands had so passed into other hands: 3. A's devisees cannot have covenant against B's executors, or the tenant in fee, for the rent in arrear; as A originally granted away the fee simple in the land, he had no reversion in it, he could devise, and so none the covenant could run with; but the covenant gave a mere right of action as on contract, and this he could not devise. The plt. is not to recover rent where he has no title; as where he sells A black-acre, and by mistake delivers it, and also white-acre, to which the plt. has no title, A enjoys it some time and is evicted by the owner, the plt. is not entitled to rent for white-acre. 1 Hen. & M. 350, 361.

1 Johns. R.  
267, Jackson  
v. Brownell.

§ 9. *Persons at the halves tenants of the land, &c.* In a lease of land &c. it was covenanted, "that in case the lessee should suffer or permit more than one family or tenant to every one hundred acres, to reside on, use, or occupy, any part of the premises, the lease should be void." Held, in an action on this covenant that letting part of the premises to persons for a year, to cultivate on shares, made them tenants of the lands within the covenant; for persons so occupying the lands have an interest in them, and are not mere labourers or servants to the lessee. But where the land was one hundred and thirty-five acres, and there was a like covenant, held, allowing one tenant besides the lessee to occupy, was no breach of the covenant. The court thought the words of the covenant pointed to more than one occupant.

1 Johns. R.  
273, Jackson  
v. Agan.

3 Johns. R.  
44.

§ 10. Though the house be burnt, the tenant must pay the rent according to his covenant. *Hallet v. Wylie*.

6 Johns. R.  
34, 37, Jackson  
v. Stuart.

§ 11. *Re-entry for non-payment of rent presumed.* As where a lease was made in 1769, reserving rent, with a clause of re-entry for non-payment of it. Lessee died in 1775.

without wife or children, and no evidence of possession continued under him, or of rent paid, the lessor took possession in 1786. Held, in 1809 a re-entry for non-payment of rent by the lessor was to be presumed. CH. 117.  
Art. 5.

§ 12. Distress for rent can only be for the rent in arrear, and not for damages for the delay ; and the lessor can only distrain for the rent in arrear and not for interest. 1 H. Bl. 465, the distress is as an execution in fact.

§ 13. The plea of no rent in arrear admits the lease as laid in the avowry. And the court is bound to give double rent under the statute of Virginia. So in New York if a tenant wilfully hold over, after the end of his term, and notice to quit, he must pay double rent to his landlord. Ch. 117, a. 10, s. 9 ; Bul. N. P. 59, 165. 4 Cranch,  
299, Alexan-  
der v. Harris.  
—7 Johns. R.  
536, Hall v.  
Ballentine.

§ 14. *Covenant to leave in repair* ;—action on it against the lessee. The estate of the lessor (truly averred or not) is immaterial when the lessee has had the fruits of his lease. Agreement to leave a farm as he found it, is to leave it in tenantable repair, if he found it so, and supports a declaration so laid. The plt. stated his estate was in fee, and it appeared it was in tail ; the tenant agreed to leave the farm in the same condition he found it. Declaration stated, in a second count, he agreed to leave it in tenantable repair. General verdict for the plt., and judgment accordingly. 2 W. Bl. 840,  
Winn v.  
White.  
5 D. & E. 374.  
—4 East, 164.

§ 15. If a lease be *ipso facto* void, by the condition or limitation, no acceptance of rent can make it have continuance as between lessor and lessee. *Secus* if one voidable. 1 Dougl. 56.  
—2 Ch. on  
Pl. 134.

§ 16. *Lessee against his assignee, &c.* September 1, 1810, William Pelham, by indenture, leased a house and shop in Boston to the plts. for four years, unless within that time the rector and wardens of the king's chapel got judgment against Pelham in a *formedon* then pending, and evicted him ; and the plts., the lessees, covenanted to pay \$1000 a year and quarterly, to said Pelham. August 8, 1811, they by deed assigned to the deft. all their interest &c., he to pay Pelham said rent, and indemnify the plts. against their said covenants to pay the said rent. Def't. entered and occupied till April 6, 1813, but did not pay the rent to Pelham, and the plts. were compelled to pay it to him, \$625.31. Plts. now bring *assumpsit* against the def't. to recover this of him. He was evicted by said rector &c., said 6th day of April, 1813. September 6, 1811, said Pelham accepted a quarter's rent of the def't. occupying under said assignment. April 25, 1809, said rector &c. required Pelham to pay them rent. Judgment for the plts. And held : 1. Said assignee, the def't., was bound to indemnify the plts. for the rent they paid while he occupied : 2. The lessee is liable to covenant, on his covenant to pay 12 Mass. R.  
43, Fletcher  
& al. v.  
M'Farlane.

CH. 117. rent to his lessor, though the lessee has assigned and lessor accepted, &c. : but 3. In such case the lessor cannot have debt against the lessee after the lessor has accepted rent of the assignee : 4. The entry of the rector &c. April 25, 1809, did not put an end to Pelham's estate as to his rent : 5. The title under the gift to the rector &c. was in *formedon*, established only from the rendition of the judgment ; no entry by the demandants, or disseizin, being alleged as the foundation of their suit : 6. If the rector &c. had a right to trespass for the *mesne profits*, it was only against Pelham, who kept them out ; for as the plts. entered under a lease, and the deft. under an assignment, neither can be viewed as trespassers : 7. Nor was there any privity between them and the rector &c., which could subject them to an action for use and occupation ; so in any view said Pelham was entitled to receive the rent of the plts. on the lease : and 8. They were estopped by the indenture, to plead he had nothing in the tenements. 15 Mass. R. 268. Covenant broken on indentures, and annual rent reserved ; before pay-day lessee was evicted by a title paramount the lessor's ; rent accruing before the eviction is not recoverable, in fact is not due.

3 Wentw.  
449, 528.—  
See Ch. 124,  
a. 7, s. 5, &c.  
like plea, &c.  
—5 Wentw.  
280.

Declarations in covenant by surviving lessors, and an after taken husband of one of them, against lessee for not repairing old buildings, and new ones built by the defts. on covenants for that purpose, but taking down part of the premises and thereby damaging the rest, 453 &c. : for not paying rent and not repairing, 455 &c. : by lessor's executor, possessed for a renewable term, not obtained, though demanded, who granted a lease for 21 years, determinable by the lessee at the end of the first 14, against the administrator of the assignee of the lessee : 1. For rent incurred ; for giving up the premises out of repair at the end of the 14 years, 461 &c. ; other counts, 466 ; for not paying rent, and not repairing and many other breaches in tillage &c., 469 to 477 : by administrator with the will annexed, and legatee of a reversion, and as assignee in the second degree of the reversion of a chattel interest against the assignee of the lessee, for rent accrued during their respective possessions, 478, 481 : assignee of the lessor against assignee of lessee for rent and want of repairs, 481, 485 ; for waste, 486 ; for not repairing, not sowing hayseed, &c., 488 &c. ; for not repairing, &c. &c. 490, 498 : for not payment of rent, *lessor v. administratrix of lessee*, 498 &c. : plea performance, other pleas, 501 : other declarations &c., 502 to 528 ; 5 Vol. 1 to 145, other declarations &c. : pleas, repaired &c., paid rent &c., 75 to 84 ; plea, tender of the rent, and *tout temps prist*, and *uncore prist*, and paid into court, 86.

## CHAPTER CXVIII.

## COVENANTS MUTUAL AND INDEPENDENT.

ART. 1. § 1. There are three sorts of covenants : 1. Mutual and independent : 2. Conditional and dependent : and 3. Concurrent and mutual conditions to be performed at the same time. There is hardly any branch of the law that requires more attention than this, in order to ascertain when covenants are of the one sort or the other ; to ascertain this correctly, more attention must be paid to the subject matter and the intentions of the parties than to any particular forms of words. And if the vendor or vendee wish to compel the other party to observe a contract, he immediately makes his own part of the agreement precedent, for he cannot proceed against the other without actual performance of the agreement on his part, or a tender and refusal. Sug. 180.

See Amer.  
Preced. ch. 9.

§ 2. It seems to be a general rule, that whenever an interest or estate commences, on a condition to be performed by the plt. or deft., or any other person, be it affirmative or be it negative, the plt. must shew it in his declaration, and aver its performance. But if the estate or interest vests presently in the grantee, and is to be defeated by matter *ex post facto*, it is otherwise ; for this shall be pleaded by him who would take advantage of it. Case of covenants dependent and independent, 13 Mass. R. 406.

4 Bac. Abr.  
16.—7 Co. 10.

§ 3. In this case Lord Mansfield said, “there are three kinds of covenants : 1. Such as are mutual and independent, where either party may recover damages from the other for the injury he may have received by breach of the covenant made in his favour, and where it is no excuse for the deft. to allege a breach of the covenants on the part of the plt.”

Dougl. 668,  
690, King-  
ston v. Pres-  
ton, cited  
also 1 Ch. on  
Pl. 311, 312.

§ 4. “Second. There are covenants which are conditions and dependent, in which the performance of one depends on the prior performance of another, and therefore till this prior condition is performed, the other party is not liable to an action on the covenants.”

See Ch. 33,  
a. 2, s. 20.

§ 5. “Third. There is also a third sort of covenants, which are mutual conditions to be performed at the same time ; and in these, if one party was ready and offered to perform his part, and the other neglected or refused to perform his, he who was ready and offered, has fulfilled his engagement, and may maintain an action for the default of the other, though it is not certain either is obliged to do the first act : and he

CH. 118. added, "the dependence or independence of covenants is to be collected from the evident sense and meaning of the parties." *Art. 2.*

Stra. 569.—  
2 Saund. 350.

1 Esp. 334,  
French v. Ir-  
win.—1 Wils.  
88.—Pow.  
on Con. 360.

2 Saund. 155,  
Hunlocke v.  
Blacklowe —  
1 Esp. 334.—  
Bull. N. P.  
165.—Dougl.  
690.—Cowp.  
56.—10 East,  
295.—12  
East, 381.—  
7 Johns. R.  
249.—  
3 Maule &  
Sel. R. 308.

5 Com. D.  
349.

3 Salk. 108.

2 Mod. 73,  
Sameway v.  
Eldaly, 309.  
—Pow. on  
Con. 259, &c.  
—Yelv. 133,  
134.

ties." In this case, "the essence of agreement was, that the deft. should not trust to the personal security of the plt.;" but that the deft. should have good security for his money, for his stock before he delivered it up to the plt. See who is to do the first act, to these points, 1 D. & E. 645; 1 East, 203; 2 Johns. R. 145; 7 D. & E. 130; 6 D. & E. 570, 668, 719.

#### ART. 2. *Mutual and independent covenants.*

§ 1. As where the plt's. testator covenanted to assign to the deft. a house, and he covenanted to pay £30; in an action for this £30 the plt. need not aver an assignment; the parties have reciprocal remedies each on the covenant made to him. 1 Bac. Abr. 551; see also 1 Ch. on Pl. 313.

§ 2. So among these mutual covenants are those where there is a negative covenant on one part, and an affirmative on the other, in consideration of the performance of the negative. As where there was a negative covenant not to follow a trade, and in consideration of that covenant the plt. promised to pay £100 per annum, during life; this is an independent covenant and depends not on the performance of the other; for the deft. never can be said to perform his covenant; for a negative covenant never can be said to be performed, so that the plt. would be without remedy for his £100 a year, if these were not mutual and independent covenants, and so afforded mutual and independent remedies.

So if A covenant to provide soldiers to be transported, and B covenant to find ships to carry them, these are mutual covenants. So if A covenant to lease land, and B covenants to pay rent.

§ 3. In this action of covenant the plt. declared, that by indenture between him and the defts., reciting several disputes as to tithes and some other things, and to end them they referred their disputes to J. S., and bound themselves to observe his award; that he did award and the deft. did covenant with the plt. that in consideration of his making one part of a lease for years (annexed to the award) at the deft's. request, for the rent therein reserved, that the deft. should pay for the tithes so much money; also, that J. S. awarded, and the deft. did covenant to account to the plt. for such arrearages of rent, tithes, &c. as should arise on the land &c.; and the plt. averred he had kept his covenants, and the deft. had not kept his, and assigned for breach that he had not accounted with the plt. for all arrears of tithes &c. arising &c., and that on request to account he refused.

§ 4. Plea, *actio non*, admitting the indenture and said covenant to account, but adding, that in that indenture it was

further agreed and provided, that the plt. should allow and discount on the account all monies for parson's dinners &c. laid out by the deft. at the plt's. request, and that on —, he the deft. was ready and offered, and yet is ready to account for all arrears &c., if the plt. would discount &c., that he would not discount it, and avers that he expended so much money for the plt. &c. The plt. demurred, and judgment for him; for the deft. was bound to account on request, and it was impertinent for him to ask allowance for his dinners &c. before he came to account; this was aiming at a capitulation beforehand; that each had a remedy on these mutual and independent covenants; and the *provisum et agreeatum est* doth not amount to a condition, but is a covenant.

CH. 118.  
Art. 2.

§ 5. The plt. states an indenture, dated February 1, 1720, by which he let to the deft's. testator a house &c. for twenty-one years, for the yearly rent of £9, and he covenanted to repair it before June 1, 1720, at his expense, 5000 slates therefor being found by the plt., and the deft's. testator to keep in repair &c., fire excepted: that he entered &c., died &c., and the deft. entered as executrix and became possessed, the plt. being seized of the reversion, and she suffered the premises to be ruinous &c. and so had broken the covenant &c. Plea, the plt. had never found and delivered said 5000 slates. Plt. demurred generally, and judgment for him; for the finding of the slates was no condition precedent, but a mutual covenant; and if not, the plea was bad, as the breach assigned was relating to a distinct subject, the not keeping the premises in repair by the assignee, the executrix; for, from any thing that appeared, the testator might have put the premises in repair. 2 H. Bl. 313, *Boone v. Eyre*; *Willes*, 146, 496.

*Willes*, 146, *Muckleston v. Thomas*, ex'rs.—5 Com. D. 611; but see *Thomas v. Cadwallader*, next page.

§ 6. This was an action of covenant wherein the plt. declared, that in consideration of £730. 10s. to be paid by the deft., he the plt. covenanted on or before March 25, next, to transfer the produce of £634. 17s. 6d. in lottery annuities, subscribed by the plt., and that the deft. covenanted to accept and pay. These were held to be mutual covenants, and judgment for the plt.

1 Stra. 712, *Dawson & ux. v. Myer*.

§ 7. So in this case it appeared: "It is agreed upon by Dr. J. P. and B. C. Esq., that the said B. C. shall give to the said Doctor £500, for such land and house and the brewing utensils. In witness whereof we do put our hands and seals, mutually given as earnest in performance 5s., the money to be paid a week after midsummer 1668." The court held, that this earnest was a part of the sum: that the action for the money is well brought, without averring a conveyance of the land. It was intended that both parties seal; and if the plt.

3 Wood's Con. 492.—As to Earnest, see Ch. 11, a. 2.

CH. 118. has not conveyed the land to the deft., he has his action for  
 Art. 3. it on the plt's. agreement in the deed, which amounts to a  
 covenant on his part to convey the land. So each party has  
 a mutual remedy; otherwise, if the deed had been only the  
 deft's. words.

3 Wood's  
 Con. 547.

§ 8. So it has been decided, that "if A covenant to serve me a year, and I covenant to pay him £10 for it," these covenants are mutual and independent, and I must pay him the \$10, though he do not serve me. "But if I covenant to pay him £10, if he serve me a year," it is otherwise. *Quart.* if the words, "for it," do not make a condition. Is my £10 to be paid for his covenant, or for his year's service. This case is cited p. 616, and the words, "for it," are omitted.

T. Raym.  
 183.—  
 3 Wood's  
 Con. 583.—  
 1 Bac. Abr.  
 561, Dyesly  
 v. Tuer.

§ 9. In an action of covenant it appeared the words in the covenant, the plt. putting the house in good repair, the deft. should keep it so, held to be mutual covenants.

§ 10. So A covenanted with B to make him a lease of his land and of his sheep, and that B should have firewood on the land; and B covenanted to pay one half year's rent at a certain day; A sued for the rent, B pleaded that A refused to lease the land &c. before the day. Judgment for the plt.; for B has his remedy on A's covenant.

8 Mod. 106,  
 Blackwell v.  
 Nash.—Stra.  
 635.

§ 11. In covenant the declaration stated the plt. covenanted by indenture to transfer South Sea stock before the 25th of March, or within four days after, and the deft. covenanted to accept the same, and to pay so much money for it within the time aforesaid, which he had not paid. The court held this to be a mutual covenant, and the plt. might sue without laying any request made by him to the deft. to perform it, or that he on his part was ready and offered to perform it, and the time is certain enough. 8 Mod. 292.

2 H. Bl. 389,  
 Terry v.  
 Duntze.  
 See a. 6, s. 8.

§ 12. If A, covenant to build a house for B, and finish it on or before a certain day, in consideration of a sum of money which B covenants to pay A by instalments, as the building shall proceed, the finishing the house is not a condition precedent to the payment of the money, but the covenants are independent, and A may sue B for the whole sum, though the house be not finished at the time appointed. Lessee covenants to leave sufficient compost &c. lessor finding a convenient place &c. is mutual.

Lofft. 56.

#### ART. 3. *Covenants conditional and dependent.*

8 D. & E. 366.  
 Glazebrook  
 v. Woodrow.  
 —5 Com D

§ 1. In covenant, the declaration stated, that by articles under seal, of March 10, 1796, between the plt. and deft., the plt. covenanted, that he would, on or before the 1st day 348. See cases 1 Ch. on Pl. 369, 313. In all events usually a condition precedent must be performed, unless its performance is prevented by him having a right to it. 1 Ch. on Pl. 318. See Jones v. Barkley, Morton v. Lamb, Rawson v. Johnson, Collins v. Gibbs.

of Aug. 1797, convey to the deft., his heirs &c., certain ground and a school-house thereon &c., and to give him possession on or before the 24th of June 1796 (with the pupils &c.) and in consideration thereof the deft. covenanted to pay the plt. £120 on or before the said 1st day of Aug. 1797, with interest from Jan. 1, 1797; the plt. sued for the £120 &c. and averred he gave possession June 24, 1796 to the deft., but the plt. did not aver he conveyed, or offered to convey the land, &c. on or before the 1st day of August, 1797. The deft. pleaded: 1. That from the time of making the said articles, until and on the 1st day of August 1797, he was ready to accept a conveyance of the ground &c. and at the same time, to pay the said £120 and interest, if the plt. would have made or procured any such conveyance, yet that the plt. did not, on or before the said 1st day of August 1797, or any time since convey to the deft. said ground &c., wherefore the deft. had not received the said £120 &c. 2. Like plea, also, stating the plt. had not tendered any conveyance of the premises &c. To these pleas there was a general demurrer, and joinder in demurrer: and on a consideration of all the cases, judgment was given for the deft. The court held the covenants to convey and to pay to be dependent covenants, and not mutual and independent, that the conveyance was the principal act which was to be on the same day as the payment, and that giving possession before did not materially vary the contract; and so this judgment is consistent with the case of *Thorpe v. Thorpe*, Page 374, *Le Blanc J.* said "This case falls within the rule first laid down in *Kingston v. Preston*, that no person shall call upon another to perform his part of a contract, until he himself has performed all that he has stipulated to do as the consideration of the other's promises.

2. In covenant against the lessee for not repairing, (the covenant adding, "the lessor allowing and assigning timber for the repairs,") it is necessary to aver the lessor did allow and assign timber for the repairs. The deft. pleaded that the plt. during the term did not allow, find, or assign timber sufficient for upholding, repairing, maintaining, and keeping the demised premises in good and sufficient repair. To this the plt. demurred generally, and judgment for the deft. The main question was, if the words, "allowing and assigning timber," were a condition precedent or a mutual covenant. Many cases were cited on both sides, and judgment for the deft. for that the declaration was bad. "This finding of timber was a thing, in its nature, necessary to be done first, and therefore must be considered as a qualification of the lessee's covenant." "A man cannot repair till the timber is assigned him for such repairs." See 6, below.

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Art. 3.

See also  
6 East, 619.—  
2 John. R.  
207.—1 East,  
629.—2 Johns.  
R. 387.—  
Willes 157.—  
5 Bos. & P.  
233.—  
2 Johns. R.  
145.—2 Dal-  
las, 317.

Willes, 496,  
500,  
Thomas v.  
Cadwallader,  
adm'r.—  
Pow. on  
Con. 260.—  
5 Com. D.  
348.

**CH. 118.** 3. In this case it was said, if the covenant had been to pay so much money for building the house, then the building had been a condition precedent. 2 H. Bl. 389, *Terry v. Duntze*.  
**Art. 3.**

8 Wood's  
Con. 499.

4. What a condition, and not a covenant. As where A, in an indenture, let lands to B, and therein it was agreed between the parties that the lessee shall not do this or that thing upon pain of forfeiting his estate; this is a condition and not covenant; for the words being indifferent whether of the lessor or lessee shall be deemed the words of the lessor.

3 Wood's  
Con. 547. H.  
Dougl. 690 n.  
Chipman 95.

If one covenant to make new pales, so as he may have the old, he is not bound to make the new, unless he may have the old pales. Where staying an execution is a condition precedent.

Co. Lit. 204.  
—3 Wood's  
Con. 547.  
—4 Inst. Cl.  
184, 186—  
5 Com. D.  
345.

5. So if one covenant to pay me money for services, counsel &c., or to make an estate &c. and the covenant is worded conditionally, and so as one thing is the cause of another, and not by reciprocal covenants, if the cause or condition be not observed, the covenant is not to be performed, the thing to be done is as a condition precedent. 6 D. & E. 665.

4 Inst. Cl.  
184.

6. So if the plt. is to find the principal timber for repairs, this is a condition precedent, but it is no objection he has not found it, where the repairs be of a nature not to want timber.

Pow on  
Con. 260. 17  
Ed. IV. 1.

7. If A and B bargain and agree that B shall go on A's land, and see his corn, and if it please him on sight, that then he shall have it, paying A £40 for every acre, this contract is binding on A, if B like the corn, and not otherwise.

8 Mod. 68,  
Weyll v.  
Stapleton.—  
Stra. 615.

§ 8. The plt. sold the deft. £200 of South Sea stock for £1425, and covenanted on or before shutting the books to transfer so much stock on payment of that sum. The deft. covenanted to accept the same, and then and there to pay the money for the said stock, at or before the shutting up the books for the Christmas dividend; and it was further agreed, that if the deft. did not accept the said stock, then the plt. might sell it to any other person at the market price, and return the overplus, if it sold at any higher price; but if it sold at a lower rate, then the deft. agreed to make up the deficiency to the plt.; a bond was given for the performance, and the plt. sued it, for that the deft. did not pay the deficiency &c. The deft. pleaded, that he made to the plt. a feoffment of certain lands in satisfaction &c.; but did not aver the plt. accepted in satisfaction, nor make a full defence by *quando* &c., nor did he state he made the feoffment in satisfaction of the penalty then due on the forfeiture of the bond. Plt. demurred to the plea, but the deft. had judgment in the Common Pleas, for faults in the declaration. Error in the B. K. and the plt. and plt. in error insisted that these were mutual covenants, to pay money on such a day &c., and the other to transfer stock; hence the default of payment on that day was

a forfeiture of the bond, and so there was no need to aver any tender, and the deft's. promise to pay for the stock did not make the transfer or tender of it a condition precedent,—but the court of B. K. held it did. The Common Pleas was of a different opinion. CH. 118.  
Art. 4.

§ 9. *On covenant of assurance who must do the first act &c.* 2 L. Raym. 750, *Heron v. Weyne*.—Lofft, 194.  
A covenants to make assurance to B at his costs ; B must tender the costs before he can require A to make the assurance : but 2. If the particular assurance be not ascertained, A must give B notice what assurance he will make. In this, as in other such cases the first act to be done depends on the nature of the transaction.

§ 10. Where to sue effectually on a note is a condition precedent, and what is prosecuting effectually, see *Betts v. Turner*, 2 Johns. Ca. in E. 305. 1 Johns. Cas. 65.

ART. 4. *Covenants concurrent, or mutual conditions, to be performed at the same time.*

§ 1. It seems to be a general rule, “that applies to every case of a sale of property, where one engages to pay on a certain day and the other to pay at the same time,” “and this whether one be stated in terms to be in consideration of the other or not;” “in neither case will the court compel one party to perform his part, until the other has done, or has offered to do his own.” Dougl. 699, *Kingston v. Preston* ; 1 Ch. on Pl. 310, 312 ; 1 Salk. 171 ; 6 D. & E. 570. Willes, 153, 496.—1 East, 203.—2 Burr. 899.—2 New R. 233.—1 Saund. 320, 362.

§ 2. A engaged to B to pay him a certain sum on request, “he assigning over to him” a certain judgment ; plea, that B, the plt., had not assigned the judgment. The plt. replied, that he was ready to assign. A, the deft., demurred. Judgment for the plt. after several arguments, on the ground that these were concurrent engagements ; but had it been the assigning of a pension, it had been a condition precedent. 10 Mod. 153, 189, 222, *Turner v. Goodwin*.—10 Johns. R. 266.

§ 3. This was covenant on a deed *poll* made by the deft., whereby he covenanted to accept so much stock, and to pay for the same £950 on a day named. The plt. sued for the money, but did not aver a delivery or tender of the stock ; for this fault judgment was against him. The court said the intentions of the parties were, that one should have the money and the other the stock ; “and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent.” It is not the covenant of both, “upon which each will have his mutual remedy ; but it is the deed poll of the deft. only ;” hence, though on a tender of the stock the plt. may sue for his money, yet the deft. on paying his money cannot recover the stock, and so shall not be obliged to pay till the stock be delivered or tendered. Stra. 569, *Lock v. Wright*.—1 Lutw. 245.—Salk. 171.—1 Saund. 319.—1 Lev. 274.—2 Mod. 33.—Lutw. 490.

**CH. 118.** § 4. This was debt for non-performance of a covenant, brought for £2200 on an indenture, dated July 20, 1691, by which the plt. in consideration of £1100 to be paid, covenanted to assign to the deft., January 30, then next, ten shares in the Linen Manufactory Corporation. The deft. covenanted he would then accept them, and then pay the plt. the said £1100 &c. Each party bound himself in a penalty of £2200 to perform covenants. The breach assigned was in the non-payment of the £1100 to the plt. on the said 30th of January. Plea, the plt. had not assigned on that day &c. Replication, he assigned, and issue tendered. The deft. demurred. For the plt. it was urged the covenants were reciprocal or mutual; for the deft. that the assignment ought to precede the payment of the money as a condition precedent to save the penalty of £2200; that the true meaning was, that the plt. should assign the shares January 30, and the deft. accept them, and on such acceptance pay the money; and so was the opinion of the court, and the plt. discontinued; the plt. should have stated he was ready to assign. This construction was also urged to avoid the penalty to which otherwise the obligor had been subject.

**Art. 4.**  
4 Ins. Cl.  
148 to 158.—  
1 Lutw. 490,  
Elwich v.  
Cudworth—  
Pow. on.  
Con. 398.

§ 5. So if A covenant to transfer stock to B on his paying £100, and B covenant to accept and then pay, A in an action of covenant for the £100 must aver a transfer or tender, and in covenant for the stock must aver payment or a tender, or offer to pay the £100. In such a case neither party means to trust the other, but that both perform together.

§ 6. In this case the deft. in consideration the plt. agreed to buy of him a certain quantity of corn at a fixed price, promised to deliver it to the plt. at S. in one month. The plt. must aver a tender of the price, for the delivery of the corn, and the payment of the price, "were concurrent acts, to be done by the parties respectively at the same time." And each must aver performance or an offer to perform, in order to have his action against the other.

§ 7. Wherever something is to be done by both parties at the same time, it is sufficient to say, he, the plt., was ready and offered to perform his part. These covenants to be performed on both sides at the same time, are more favoured of late years than formerly, and for good reasons,—the notion of mutual remedy by suit is often ideal and costs more than is got by it, by reason of the insolvency of the deft. or some other circumstance.

§ 8. A covenanted to convey certain lands to B, May 1, 1806, and B covenanted to pay \$1000 that day, and \$875 more, May 1, 1812; adjudged dependent covenants and concurrent as to May 1, 1806.

2 Johns. R. v.  
207, Green v.  
Reynolds.

ART. 5. *But the defect of averment of performance, or offer to perform, is often cured by the other party's pleading over.* CH. 118.  
Art. 5.

§ 1. Where the plt. declared he held in mortgage two closes, and a discourse was had between them as to the plt's. releasing his right of redemption to the deft. in them, and as to divers sums the plt. owed the deft. on said mortgage, on which the plt. agreed to release said equity to the deft., "in consideration of which" the deft. agreed to pay the plt. £7 above all that was due, and that in consideration the plt. promised the deft. to perform all on his side, the deft. promised the plt. to perform on his side; averred he did perform all on his, the plt's., side, but that the deft. paid £1. 7s. of the said £7, and no more.

§ 2. The deft. pleaded in bar, that long after the promise, to wit: July 20, 1694, the plt. did, by indenture, made between him and the deft., release to the deft. all actions, debts, &c. "and all demands whatsoever." On oyer of this deed of release, it recited said mortgage and released all provisoes therein, and all his estate, right, title, and interest in said closes, both in law and equity, and then followed the foregoing clause. Plt. demurred, and had judgment.

§ 3. The deft. objected that the consideration stated was not good; because the plt. did not aver or shew the equity of redemption was of any value: 2. Because it was not averred the mortgage was forfeited: 3. Because this release made after the promise on which the action is brought was made, released this promise. The plt. said the £7 was to be paid by the deft. in consideration of this release, hence it could not extinguish this debt; that the release of this equity was a good consideration, &c.

§ 4. The court held: 1. That this release of an equity of redemption was a good consideration &c.: 2. That when the doing a thing is a good consideration, the promise to do it is also good: 3. That though the want of an averment that a release was made, would have been bad if demurred to as informal and wanting time and place; yet it is now helped by going over and pleading a release, whereby he "admits the plt. had a cause of action. The cases put were, if one covenant to do several things in a certain deed agreed on, and in the end binds himself in a penalty for so doing, and in debt brought for the penalty, and shews generally that he has done nothing of what is agreed on, this would be bad on demurrer, but a plea over cures it." So if the defts. covenant that if J. S. do such and such things he will pay him £10; J. S. brings an action and states, "generally, that he performed all things," this would be bad on demurrer, but is curable by pleading over: 4. That these are not mutual promises, for the

12 Mod. 455  
to 467,  
Thorpe v.  
Thorpe.

**CH. 118.** £7 was to be paid in consideration of the release and not of a promise to release.

*Art. 5.*

§ 5. Fifth. The promise to pay the £7 was not discharged by the release; for the £7 was not demandable till after the release was made; then till it was made no action lay for the £7, and "a release of all demands will not release a thing that does not lie in demand at that time. 2 Cro. 171; 5 Co. & Hoe's case. A release to bail before there is a judgment against the principal is not good; because till then the cause of action is uncertain, and so not demandable.

3 H. VI. 8.

§ 6. This was a case of covenants in an indenture, and debt was on it for a penalty contained in it; by the deft. bound himself, "if he did not perform all the covenants in the said indentures" &c., to incur the said penalty; regularly, in such cases, the way is for the plt. to state the indentures, and assign a breach of one of the covenants in certain. In debt for the penalty he said, generally, "that the deft. had broke all the covenants in that indenture," without shewing any one in certain. The deft. pleaded a collateral matter in bar; and the court held that this declaration had been bad on demurrer; but that the plea over cured it, though the breach was double and uncertain. 9 H. VI, 16, 19; 1 Vent. 114. 214.

Cro. Car. 384,  
Vivian v.  
Shipping.

§ 7. In this case the plt. declared that in consideration he engaged to stand to the award of A and B, for certain matters and disputes between him and the deft.; and if he, the plt., failed to pay to the deft. £40, the deft. promised in the same manner to pay £40 to the plt., if he, the plt., did not perform on his part; and the plt. stated that A and B made an award that the plt. should pay to the deft. £10, viz. on the 18th of August following, and in consideration thereof the deft. should be bound to the plt. in a bond of £80, that the plt. should enjoy such lands during the deft's. life, or that he would on request pay him £40; and the plt. stated in fact, that he performed the award on his part, and such a day and place required the deft. to give such bond according to the said engagement; yet the deft. had not sealed the said bond, nor had paid him the £40 according to his promise. The deft. pleaded no such award, and found against him. He moved in arrest of judgment, stating the declaration was bad: 1. Because the plt. did not allege he paid the £10, "and the award is conditional, in consideration thereof," and if not paid the deft. is not bound to make the obligation: 2. Because the plt. did not allege a special request for the payment of the said £40, and the engagement was to pay on request, and without request it is not payable.

§ 8. The court decided: 1. It is a conditional award, and there was a condition precedent, which if not performed the

other is not bound to make the obligation : 2. All the judges held, that though it be a condition precedent, yet when the plt. says he has performed the award on his part, it is intended he hath performed it, and good in substance, though not in form, and the deft. might have demurred, and when he has not, but pleaded to issue, as he has, he shall not now have advantage of this matter of form,—so not showing performed is but form.

CH. 118.  
Art. 6.

9. § *Covenants independent.* A covenanted to provide vessels and funds for certain mercantile expeditions, and B covenanted to select goods, or send samples if necessary ; the expedition to be fitted out by A, in one month, and if not, the contract to be void ; and the party in fault to pay damages and costs &c. Held, these covenants were independent of each other, nor was B bound to select the goods till the vessels were provided by A, but for non-performance by A, B had his action for damages &c. Special pleadings, see 1 D. & E. 645.

2 John's R.  
146. 149,  
Barrass v.  
Madan.

So A covenanted to build a house for B by November 1st, for a sum named ; part of it B covenanted to pay May 1st, and the residue when the house should be finished. Held, these were mutual covenants. See a. 6. s. 8.

2 John's R.  
272, Seers  
v. Fowler—  
and 387,  
Havens v.  
Bush.—See  
a. 6. s. 8 ; a. 8:  
s. 1, 2.

So where A covenanted with B, to do a certain job for \$700 in a time fixed, and B covenanted to pay the sum, half cash, half goods, to be paid as the work progressed, and the whole when done ; held to be independent covenants ; the goods were paid &c. 5 Johns. R. 78, 179, 182 ; 7 Johns. R. 217. A's readiness to mortgage lands to B, he is to convey to A, is sufficient.

§ 10. So where the plt. by articles of partnership, agreed to receive the deft. as a partner, and to give him half the interest in the lease of the house, to commence from and after September 29, the deft. covenanted to pay £300 on or before that day as a premium, to be admitted as a partner ; on non-payment of the £300 at the day, the plt. may sue, averring his readiness, to take the deft. as partner, without executing or tendering articles of copartnership, or a conveyance of the lease.

Anstr. 269,  
Walker v.  
Harris.

ART. 6. *Covenant—rules to decide when dependent, when independent.*

§ 1. It is very difficult from the cases in the books to decide what are dependent and what independent covenants, some rules, however, are useful.

First. Covenants are independent, and the plt. suing need not aver a performance on his part, when his act to be done by him is in no wise a condition to the doing of the deft's. act. As if A covenant with B, to serve him a year, and B covenant with A to pay him £10 ; here A may sue for the

1 Saund. 321,  
Serj. Wms.  
note.—Lofft,  
194.

**CH. 118.** £10 before any service performed. But if B had covenanted to pay him £10 for the service, these words would make a condition precedent, and A must perform the service before he can demand payment. *Thorpe v. Thorpe*. So if A, in consideration of £10, promise to deliver B all the books of the law, he may sue for them before payment; "but if A in consideration that B will pay him £10, will deliver to him all the books of the law, B cannot bring an action for the books before he has paid the money; cites 1 Roll. R. 125; *Eve-rard v. Hopkins*.

§ 2. So where A covenanted with B to assure him the lands, and B in consideration of the same performed, cove-nanted to pay £100, the assurance is a condition precedent, and the covenant is dependent, but if the words had been in consideration of the said covenant to be performed, then in-dependent; cites 3 Leon, 219, *Brown's case*.

§ 3. In the inquiry, if a covenant be dependent and so the plt. must aver and prove performance on his part, before he can call on the deft. to perform on his, or independent, and the plt. may sue without so averring, it is a rule the covenants "are to be construed to be either dependent or independent of each other, according to the intention and meaning of the parties, and the good sense of the case," "and technical words should give way to such intention:" cites 1 D. & E. 645, *Hotham v. E. I. Comp*; 6 D. & E. 668, *Porter v. Shephard*; Do. 571, *Campbell v. Jones*; 7 D. & E. 130, *Morton v. Lamb*.

Second. If a day be appointed for payment of the money, or a part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consid-eration of the money or other act, is to be performed: an action may be brought for the money, or for not doing such other act, before performance; for it appears the party relied on his remedy, and did not intend to make the performance a condition precedent: cites *Thorpe v. Thorpe*, *Peters v. Opie*, *Callonell v. Briggs*, *Terry v. Duntze*, *Campbell v. Jones &c.* And so it is where no time is fixed for the performance of that which is the consideration of the money or other act, as in *Pordage v. Cole*, where the money was appointed to be paid on a fixed day, which might happen before the lands were, or could be conveyed. Here the party agreeing to pay his money before he could have the lands by the terms of the covenant, shews he did not expect the land to be conveyed before or even when he paid his money, but afterwards, and therefore, that he relied on his covenant to obtain the land, and did not mean to make the conveyance of the land to him a condition precedent to paying his money; and that the par-

ties made independent covenants. So is 48 Ed. III. 2, 3. 1 **CH. 118.**  
Lutw. 250. **Art. 6.**

When a day is appointed for the payment of the money &c. and the day is to happen after the thing which is the consideration of the money &c. is to be performed, no action can be maintained for the money before performance, for here it appears the party was not to pay till he had the thing, and that the other party was to convey the thing before he could demand his money. This seems to be a case of a double aspect, as if I agree to convey black-acre to A, the 1st of August next, and he agrees to pay me \$1000 for it the 1st of September next, now as I agree to convey the land to him before I am to be paid for it, if I fail to convey August 1st, he may sue me for not conveying, and need not aver he has paid, so my covenant is independent as it respects his remedy. But if he fail to pay September 1st, and I sue him for the money, must I not aver and shew I have conveyed the land to him. If so, his covenant is dependent, and my conveyance is a condition precedent to my having the money.

Heard v.  
Wadham,  
1 East, 619.—  
Obermayer  
v. Nichols,  
6 Bin. 159.—  
4 Bro. C.C.  
332.  
8 D. & E.  
370 —  
3 Anstr.  
877.—4 D. &  
E. 761, Good-  
ison v. Nunn.  
Pow. on Con.  
370.—1 Salk.  
113.

3 East, 443.

§ 4. Where a covenant goes only to part of the consideration on both sides. and the breach of such covenant may be paid for in damages, it is an independent covenant, and an action may be maintained for a breach of the covenant on the debt's. part, without averring performance in the declaration. As in this case where A by deed conveyed to B the equity of redemption of a plantation in the West Indies, together with the stock of negroes on it, in consideration of £500, and an annuity of £160 for life, and covenanted he had a good title to the plantation, was lawfully possessed of the negroes, and B should quietly enjoy. B on his part covenanted, that A well and truly performing all and every thing therein contained on his part to be performed, he, B, would pay the said annuity. A sued for it on this covenant of B, and assigned for breach the non-payment of the annuity; B pleaded that A was not at the time legally possessed of the negroes on the plantation and so had not a good title to convey. The plt. demurred, and the court of K. B. held the plea was ill, and added, that if such pleas were allowed, any one negro on the plantation, not being the property of A, would bar the action. The whole consideration of B's covenant, who was the purchaser, to pay the money, was the conveyance of A, the seller, to him of the equity of redemption of the plantation, and also the stock of negroes upon it. B's excuse for non-payment was, that A had broken his covenant as to part of the consideration, namely, the stock of negroes. But as it appeared that A had conveyed the equity of redemption to B by a good title, and

Boone v.  
Eyre, 1 H.  
Bl. 273,  
Note a.

CH. 118. so had in part executed his covenant, it would be unreasonable that B should keep the plantation and yet refuse payment, because A had not a good title to the negroes. Besides, the damages sustained by the parties would be unequal, if A's covenant were held to be a condition precedent; for A on the one side would lose the consideration money of the sale, but B's damages on the other might consist, perhaps, in the loss only of a few negroes. And it is a general rule, when a party receives a part of the consideration coming to him in the bargain, the law will compel him to perform the agreement on his part, and leave him to his remedy to recover any damages he may have sustained in not receiving the residue of the consideration coming to him. And it is another rule, that it must appear "upon the record, that the consideration was executed in part." This action was on a deed, by which the plt. had conveyed the equity of redemption to the defts., the title to which he confessed. As to the distinction between conditions that go to the whole contract or only a part of it, see also 4 East, 477; 10 East, 555; 1 Maule & Sel. 111.

9 Mass. R. 78,  
Johnson v.  
Reed & al.

§ 5. The same rule holds in promises independent, for whether a promise or covenant, the principle is the same. As where Reed & Cummings engaged to pay Johnson, on or before the 1st of September next, all sums he, Johnson, should recover against Thomas Millet, and interest to begin at the date of this promise; and Johnson engaged to let them have all the advantages of the demands he was entitled to;—dated September 13, 1808, signed by plt. and defts. Here the defts. were to pay on a day certain, certain sums. The plt. sued, he recovered judgment against Millet, Nov. 1808, for \$45.71, and sued execution within thirty days, and had sufficient property attached, kept the same in his hands to set-off against an execution Millet had against him till his attachment was lost. January 1809, the plt. offered the execution against Millet to Cummings, provided the defts. would give their note for the amount of the judgment, and not otherwise; this the defts. refused to do. In March 1809, the plt. offered the execution to them without requiring a note, but they refused to accept it as the attachment was lost. Judgment for the defts.; for it was contemplated the plt. would do a thing on an event to happen before the pay-day, September 1, 1809; and the event did so happen, and he failed to perform the thing; so not entitled to an action for the money. In fact the defts. pay-day was considered as subsequent to the act to be done by the plt.; so not inconsistent with the adjudged cases on this head, though the precise time of that act was not fixed. There were further reasons for this judgment; the plt. had disabled himself to perform, the parties evidently had rescind-

ed the contract, and had the plt. recovered, he must have been liable in an action to the defts. for the very same sum. See 10 East, 295, and many cases cited; see *Atkinson v. Ritchie*, Ch. 33, a. 2, s. 20. CH. 119.  
Art. 1.

§ 6. As to the manner of averring performance, an averment may be in any words amounting to an express allegation; and see *Rex v. Horne*, *Eaton v. Southby*. So to aver that A was seized in fee and died, and that the land descended to his son and heir, is a sufficient averment A died seized. Though usual, not necessary in declaring on mutual covenants and promises between lessor and lessee, to aver the plt. has performed all things on his part to be performed, though after verdict it may aid the omission in his not averring performance of a particular fact; and whenever necessary for the plt. to aver performance of his part, he must shew it is according to the intent of the contract; for if that be not performed, it is not sufficient to pursue the words. See other cases, Ch. on Pl. 316, 317. 1 Saund.  
117 n.—4  
Com. D.  
Pleader C,  
77, 68.—2  
Saund. 61.

§ 7. Equity cannot dispense with a condition precedent, as it cannot alter or vary the bargains of the parties:—and a condition annexed to a power of leasing given to a tenant for life is precedent. Lutw. 258,  
Prideaux v.  
Rawlins.—  
Gwynns v.  
Hodges,  
Yelv. 11, 87.

§ 8. *Covenants independent in part, in part not.* A agreed to complete a turnpike road by October 20, 1810, and B covenanted to pay him for completing the whole work \$6000, to be paid in instalments as the work progressed. Held, A could not recover the \$6000, without averring the whole work done, and if he sued for a ratable part, he must shew a ratable performance. New. on  
Con. 260.—  
4 Cruise, 294.

10 Johns. R.  
203, Cun-  
ningham &  
al. v. Morrill.

## CHAPTER CXIX.

### COVENANT LIES IN SUNDRY CASES, IN OTHERS NOT.

#### ART. 1. *Sundry cases in which this action lies.*

§ 1. There are many cases in which this action of covenant lies, not reducible to any particular heads; yet in these scattered cases are involved principles important to be known.

§ 2. If A covenant to convey lands to B by such a day, and after, and before the day, B disseizes A, and keeps the land with force and arms till after the day, this excuses A, and

3 Wood's  
Con. 632.—  
8 Co. 92.

CH. 119. covenant lies not; for the law will suffer no man to prevent an act's being done, and then sue for its not being done; but if B in such case also makes a covenant to pay A for the land on a certain day, A may sue B on this covenant, as it is B's own fault alone he has lost his action on the covenant.

Perkins, sect.  
766.—  
3 Wood's  
Con. 533.

§ *Act of a stranger.* If A covenants that his son shall marry B's daughter, and she refuses, yet an action of covenant lies against A, for the daughter is a third person, a stranger, and A has engaged absolutely that his son shall marry her, and A might have added a *proviso* to save his covenant in the case of her refusal. See *Shubrick v. Salmond*, and other like cases.

1 Esp. 319,  
Griffith v.  
Goodhand,  
Jones, 191.

§ 4. If the covenantor do any act contrary to the meaning of his covenant, though not against the letter of it, this action of covenant lies against him; as if he sells the grains of his brewhouse to the plt. for seven years, and then spoils them by putting hops into them, so that cattle will not eat them; for the meaning is, that the covenantee shall have the grains in a useful, not in a useless state,—and the intentions of the parties are to be collected as well from the facts, circumstances, and reasons of the case, as from the particular words they use.

1 Esp. 320.—  
1 Saund. 411.  
—Cro. El.  
517.

§ 5. But in some cases a covenant shall be confined to the true meaning of its words, as to time, persons, and matter. As if one accept an office and covenant to account for the monies he shall receive in it, and receive monies after the year, no action of covenant lies for these; for as to these there must be a new ground of action. So where two wharfingers dissolved their partnership, and covenanted, "that the plt. should have a moiety of the goods, and that each should bear his equal share of the expense of weighing and dividing, but that the plt. should solely bear the charges and expenses of conveying the moiety of the goods to a warehouse he had taken;" held, no action of covenant lies against the deft. for not delivering the plt.'s moiety of the goods; for by no part of the covenant was the deft. to deliver them; but if the deft. had obstructed the plt. in removing them, an action had lain against him on the implied covenant, or covenant by fair construction, that the plt. was freely and unobstructed to remove the moiety to his newly provided warehouse. In this case the words in their obvious meaning express the true intentions of the parties.

1 Esp. 321,  
Stephens v.  
Carrington,  
Doug. 26.

Taxes.  
1 Salk. 198.—  
1 L. Raym.  
317.—3 D. &  
E 377, 602.  
Hyde v. Hill.  
—4 Cranch,  
230

§ 6. On the same principle a covenant by the lessee to pay all taxes will extend only to such taxes as were in being and use before, and not to taxes after laid and of another nature, and express covenants qualify the generality and extent of covenants in law, as before stated. (The carriage tax is not a direct tax, 3 Dallas, 171.)

1 Esp. 339 —  
1 Saund. 381.

§ 7. If the covenant be a covenant in deed, the action lies

only for a misfeasance, but not for *non-feasance*. As if a man grant a way, covenant lies for stopping it up, but not for letting it be out of repair. "For covenant in deed must be broken by some act," as above stated. As where in marriage articles the husband covenanted, that the lands assured to the wife for her dower were of the yearly value of £1000, and should so continue, notwithstanding any act done or to be done by him, and the breach assigned was, that the lands were not of the yearly value of £1000, and the court decided, that the action of covenant did not lie, for there was no act done causing a breach. This decision was on the ground, that he covenanted merely against his own act done or to be done by him, and not for the value of the land independent of such act.

CH. 110.  
Art. 1.

Cro. El. 43,  
Lord Rich v.  
Lady Rich,  
cited 1 Esp.  
330, 340.

§ 8. The rule seems to be laid down too generally here, that a covenant in deed must be broken by some act, and cannot be by *non-feasance*; and *Espinasse* means some act, by a third person; the case he cites from 4 Leon. 48, 49, does not apply, wherein he states a parson let his rectory for three years, and covenanted with the lessee that she should have and enjoy it during the term, without any expulsion or any act done by the lessor; the parson was afterwards deprived for not reading the articles under 13 El., and his successor *ousted* the lessee who brought covenant, and the court held, this action did not lie, "for this was no act of the lessor, but merely a *non-feasance*, and so not within the covenant;" was a *non-feasance* as to the parson, but not as to the successor, but as to him it was an act of *entry* and *ouster*. The rule, that some act must be done to work a breach of covenant must be confined generally to a covenant that the covenantor will not do an act, or that a damage shall not accrue by his act to the other party; for it is a first principle in covenant, as in contracts, that an action lies against the covenantor whenever he fails, by tortious act, negligence, *non-feasance*, or otherwise to make good his covenant, whereby the covenantee sustains an injury. And the next rule seems to be more correctly laid down, in which it is said, "but in case of a covenant in law, an action lies on it, though there has been no act to cause a breach;" and cites *Holder v. Taylor*, mentioned in a former article.

§ 10. So if A covenant with B to give him license to carry away trees or other things, purchased of A, and a stranger having right disturb B, he has no action of covenant on this account against A, for his covenant extends only to his own personal acts; but otherwise if the covenant had been, "that he shall have license," "for this extends to all strangers."

3 Wood's  
Con. 534;  
cites 18 Ed.  
IV. 4, 20.

§ 11. If the lessee of a house covenant, not to lease the shop, yard, and other things pertaining to the house, to one

3 Wood's  
Con. 534.—  
Rol. Abr. 427.

CH. 119. who sells coals there, and after he lets all the house to one  
 Art. 2. who sells coals, he has broken his covenant ; for the intent  
 ought to be performed, and an action lies, for the obvious in-  
 tent was to exclude coal sellers from the premises.

3 Wood's  
 Con. 534. § 12. On a covenant to convey land, the conveyance must  
 be not only absolute but an effectual one ; for so is the obvi-  
 ous and plain meaning of the covenant to convey.

Brownl. 21. § 13. A merchant covenants, that if the master of a ship  
 will bring his freight to such a port, he will pay him so much ;  
 and a part of the goods were taken by pirates, and the rest  
 unloaded, the master cannot have an action of covenant for  
 the money ; for his agreement is not performed, and in his  
 agreement he made no exception against accident, as might  
 have been done, and probably, if so intended by the parties,  
 would have been done.

3 Wood's  
 Con. 538,  
 539 ; cites  
 Style, 31. § 14. *No request necessary.* This was an action of cove-  
 nant in which the plt. declared, that the deft. had covenanted  
 to pay him so much money as he should expend in repairing  
 and victualling a ship for him ; and the plt. averred, that he  
 had spent £300 in repairing and victualling the ship. The  
 deft. among other things demurred to the declaration, because  
 there was no request alleged to pay the money, and said that  
 without request he was not bound to pay. But the court held,  
 the action lay, and said, "the plt's. action is not an action of  
 debt when a demand is necessary, but an action of covenant,  
 where it is not necessary to allege a demand." But the true  
 reason seems to be this ; the plt. had laid out the money by  
 special agreement with the deft., and at his request, in fact,  
 and in virtue of his so doing and of the said covenant, the  
 deft. had become indebted to the plt., and then, on the gen-  
 eral principle of law in such cases, no request was necessary.  
 The monies had in fact become due from the deft. to the plt.  
 without request.

ART. 2. *Covenants discharged, suspended, or extinguished.*  
 5 Co. 23, Ma- § 1. It is a general rule, if the deed itself containing the  
 thewson's case, & ante. covenant or estate on which it depends, be ended, the cove-  
 —Cro. El. nant is also ended. As if a lease for life or years be surren-  
 546 —Am. dered, whereby the estate is gone, or the deed becomes void  
 Prec. 89.—4 by rasure, &c. the covenants in it &c. are also gone. But his  
 Ed. III. 27. surrender does not discharge a covenant previously broken,  
 —2 Danv. 91. for thereby a right of action is vested, and the covenant re-  
 —Bro. Sur- mains *quoad hoc* ; as if a parson lease his glebe for years,  
 render, 42, and inserts covenants in the lease, and afterwards resigns,  
 Moile v. whereby his lease is at an end, still his covenants remain in  
 Austin. force as to the time before his resignation ; because putting  
 an end to covenants cannot, any more than repealing statutes,

destroy rights previously vested under them, or by some of them. CH. 119.  
Art. 2.

§ 2. If the covenantee, by deed, release all covenants, they are extinguished and gone, but his release must be by deed, for a covenant by deed cannot be discharged by word. See *Goodright v. Davids*. 3 Wood's  
Con. 543.—  
Pow. on C.  
431.

§ 3. So a covenant for the payment of money cannot be discharged without deed. The deft. pleaded a discharge in the nature of a release; and on demurrer held to be no bar to the action on the covenant. But this rule holds, as in *Blake's* and other cases, only where a right of action accrues by the deed itself, and not by the deed and subsequent neglect, as in the case of a covenant to repair and neglect to repair. 2 Wils. 376,  
Rogers v.  
Payne.—6  
Co. 44,  
Blake's case.

§ 4. If A covenant to build a house for B, by a certain day, and B forbid him to do it, and thereupon A forbears to do it, his covenant notwithstanding is broken, and an action of covenant lies against him; for this parol forbidding is no discharge of his covenant; but the case is otherwise if B by actual impediments and obstructions prevent or hinder him, or is the cause why the thing is not done; then the not doing it is no breach of the covenant. 3 Wood's  
Con. 610.—  
Cro. El. 374,  
Carrel v.  
Read.

§ 5. *A covenant discharged in part.* As where the owner of a ship covenants with B to receive such loading as he shall appoint at G, by such a day, and then to go with the first fair wind to R, and there unload and take in other goods, and afterwards B discharges him from taking in the goods at G, but that he shall receive his loading to R; this discharge of part of the covenant does not discharge the residue; for these are several covenants; but then to discharge one such covenant by the covenantee, and for him to hold another valid and binding, they ought to be clearly distinct covenants and depending on distinct considerations. 3 Wood's  
Con. 543.—  
Rol. Abr. 472.

§ 6. Where covenants are discharged by taking off the seal of one of the covenantors, see a former chapter and article.

§ 7. If an estate be created, and a covenant in law annexed to it, if the estate cease, the covenant will cease; but otherwise if express covenant be annexed: and an action lies after the estate is at an end. 2 Brownl.  
162.

§ 8. *Covenant discharged by altering the subject &c.* As where the mayor and citizens of London covenanted to find eight men daily to grind in Bridewell mills, let by them to the deft., and agreed that if they failed therein, the deft. should retain so much out of the rent. He turned the corn-mill into a horse-mill, and the court decided that he could not make the deduction from his rent; for by this alteration of the mill, Cro. Jam.  
182, London  
v. Greyme;  
cites Moore,  
877.—4 Co.  
87 a.

CH. 119. the lessor's covenant is discharged ; and further that this conversion was waste, though for the lessor's advantage ; and so is the converting a corn into a fulling-mill.

Art. 2.  
2 Mod. 138,  
Cook v. Herle.

§ 9. *Covenants collateral not discharged.* As if A grant a rent charge to B for C's life, to hold to B, his heirs and assigns to the use of C, and A covenants with B to pay it to the use of C ; B may have an action of covenant against A if the rent be in arrear ; for though this rent is executed by the statute, and the power of distraining incident thereto is transferred to C, yet as A's covenant is collateral, it is not transferred or discharged, but remains with B ; and though the act execute the estate in C, it does not affect this covenant from A to B.

3 Wood's  
Con. 648.—  
Allen, 88.

§ 10. *A covenant till broken is not discharged by a release of all actions*, for it is no duty or ground of action before it is broken ; and when broken the action is not founded merely on the specialty, as if it were a duty, but savours of trespass ; and so accord and satisfaction is a good plea to an action on it, and it lies in damages.

Cro. El. 167,  
Landydale v.  
Cheyney ;  
cites 32 H.  
VI. 33.—  
Dyer, 257.

§ 11. This action of covenant does not lie where the covenant is broken after the estate is ended whereon it depends ; for in such case the estate is gone before the right of action accrues. As where A, tenant for life, leased for years to B, and he by indenture granted and sold all his estate to C, to hold in as ample manner and form as he ought to hold it ; A died, and the reversioner entered ; C brought an action of covenant against B, and the court decided it did not lie ; for if any covenant, it is determined with the estate. So if tenant in tail make a lease for years, and die without issue, the covenants end with the estate. But a distinction must be made between *dependent* and *collateral* covenants ; the former fall with the estate, but not the latter.

7 Johns. R.  
73, Slosson v.  
Beadle.

*Election, liquidated damages, &c.* A, in consideration of \$500 paid in full for a lot of land, covenanted to convey it to B, by a good and sufficient deed, by or before a day named, or in lieu thereof to pay him \$800. Held, B had the election after the day, and was entitled to recover the \$800 with interest, being as liquidated damages ; and where such a deed is to be given on a certain day, and though the land is to be appraised in the mean time by commissioners named, yet it is sufficient for the plt. to declare he was ready to receive the deed, but the deft. had not conveyed &c. Held, on demurrer ; and see Perkins v. Lyman & al.

*Action of covenant.* Held, the rule is settled that where mutual covenants go only to a part of the consideration, and a breach of that part may be paid for in damages, the deft. shall not set it up as a condition precedent. In such cases

the covenants are to be viewed as independent. The declaration stated, the testator at ———, by his deed &c., agreed with the plt. for \$400 to be paid him, to convey to the plt. on or before December 1, then next, one certain lot of land in N, the same to be appraised by S. & H., and if appraised over \$400 &c., it was to be made up to the testator, and if less, the sum short to be deducted from certain notes given by L. & J. The plt. averred he was ready to receive the deed &c. until said 1st day of December was past, and the testator did not deed or convey &c., and was in full life until after the 1st of December, and so the testator broke his covenant &c. On a general demurrer to this declaration, judgment for the plt. First objection to it was, the plt. had not averred the lot was appraised, or that he was ready to pay the overplus, (if any,) on such appraisement: 2. The land is not well described. It seems the \$400 was paid. The court said, the damages sustained would be unequal, if the plt's. covenant be held a condition precedent; and he had executed the bargain in part: and relied on *Boone v. Eyre*, Ch. 118, a. 6, s. 4; *Campbell v. Jones*, Ch. 118, a. 6, s. 3, &c.

CH. 119.  
Art. 2.

Ch. 118, a. 6,  
s. 4.—6 D. &  
E. 570,  
Campbell v.  
Jones —Ch.  
118, a. 6, s. 3.  
—1 Saund.  
320 c.

§ 12. And in cases of covenants depending on the estate, an action lies if the covenant be broken before the estate ends; for then pending the estate, a right of action accrues and vests, and this right continues and the action lies, though before it be commenced the estate expires.

§ 13. As where the plt. brought an action of covenant, for that the deft., 35 El., let to the plt. certain estates for six years, and covenanted that he should enjoy them quietly during the term, without interruption and discharged from tithes and other duties; and that, if the tithes were demanded and recovered against him during the term, he should recoupe in his hands so much rent as the tithes amounted to. The breach assigned stated, 42 El., the parson sued him for tithes of corn growing there in the years 38 and 39 of El.; hence he brought this action. On demurrer it was adjudged by all the court, that this suit for tithes in the term, brought after it expired, was well brought, for the plt. did not enjoy the estates discharged or free from suits, as the parties intended, and he is as much prejudiced by a suit *after*, as during the term. But the court also held, that the declaration was bad, because it was not alleged in it that the parson's suit was lawful, or that the tithes were due; for the lessor was not bound to discharge the lessee from illegal actions; cites *Noke's case*, 4 Co. 80; *Cro. El.* 674.

Cro. El. 916,  
Lanning v.  
Lovering.

§ 14. If the obligee covenant never to put a bond in suit, it is in fact discharged, and the obligor may plead this cove-

1 Bac. Abr.  
562.—Cro.  
El. 352, *Doux*  
v. *Jefferies*.

CH. 119.  
Art. 3.



4 Bac. Abr.  
87, Thompson  
v. Noel.

nant in bar as a release. But if the obligee covenant that he will not sue for a certain time, it is otherwise, this is no discharge of the bond, but the obligor may be sued and his only remedy is by an action on the covenant.

§ 15. *Plea to a part.* As in this case the plt. declared, that he had covenanted to take 280 men from the deft. to carry to —, and the deft. covenanted to have them ready and to pay £5 a man for the carriage; that the deft. had not 280 men ready, but only 180, which the plt. carried, and the deft. had not paid for them. The deft. pleaded that he had 280 men ready and tendered them, and that the plt. would not receive them. But the deft. said nothing about carrying the 180 men, or his not paying for them; and as this was not a plea to the whole, but to a part only, that is, to the having them ready only, judgment was given for the plt. on demurrer.

11 Mod. 254,  
Trant's case.

§ 16. It is a rule well settled, that if the obligee covenant not to sue one of several joint and several obligors, it is no discharge as to the rest of them, but an action lies against the rest, and the one having the covenant has his remedy by action of covenant, and it is no discharge even of his contract in the bond if the covenant be for a certain time.

3 D. & E. 590,  
Littles & al.  
v. Holland,  
cited 1 Ch.  
on Pl. 113.

§ 17. Parol agreement cannot enlarge the time in a covenant. As in this case the plts. covenanted to build two houses for the deft. on or before April 1, 1788, in consideration of which the deft. agreed to pay £500. The declaration stated that they were built by the time &c. and that the deft. had not paid. The deft. pleaded, (among other things) that the plts. did not finish them by the 1st of April 1788, and issue was joined. The evidence was, that the time had been enlarged by parol agreement, and that the houses were finished within the enlarged time. The court held, that the evidence did not support the plt's. action of covenant; for a covenant under seal cannot be dissolved or varied by parol agreement. Though a covenant under seal cannot be dissolved or varied by parol agreement, yet such covenant may be defeated by an act even in *pais*, as if the lessee covenant under seal to pay rent and is evicted by the lessor, the covenant is defeated and the lessor can have no action for the rent on it.

ART. 3. *Estoppel in covenant.*

3 D. & E.  
442, Hayne  
v. Maltby.

§ 1. Actions of covenant often exist, by reason that the deft. is estopped to deny the plt's. right to support, and sometimes the plt. is *estopped* to bring this action, by reason of some act he had done that operates by way of *estoppel* to him. On the ground of *estoppel* the landlord may covenant for rent so long as the tenant holds under his lease; because so long the tenant is *estopped* from denying his landlord's title; but when he

is evicted he has a right to shew that he does not enjoy that, which was the consideration for his covenant to pay the rent, notwithstanding he has bound himself by the covenant. The lessor's expulsion of the lessee destroys the privity between them, and though an act in *pais*, it bars the lessor to claim rent on the lessee's covenant, though made under seal. CH. 119.  
Art. 3.

§ 2. Though it is true on a lease by indenture, the lessee is estopped to say the lessor had no interest during their joint lives, yet if the lessor be but tenant for life, the lessee is not estopped to say so in covenant brought by the heir of the lessor after his death; for an interest at first passed from him, and the lessee is not estopped to shew it determined. The indenture, in fact, only estops the lessee to say he took no interest under it. Therefore, when he admits that he took an interest under it, he is not estopped to shew that interest is terminated. 2 Wills. 143,  
144, Brudnell  
a. Roberts.—  
8 D. & E.  
498, and  
post.—  
2 Selw. 456.  
—1 Ch. on  
Pl. 1.

§ 3. This was an action of covenant on an indenture for not repairing, against the lessee by the lessor. The lessee is estopped to plead in bar, that the lessor had only an equitable interest in the premises in the right of his wife, as *cestui que trust* for her life; for this plea is tantamount to a plea of *nil habuit in tenementis*. But it seems the lessee is not estopped to shew the lessor was only seized in right of his wife for her life, and that she died before the covenant was broken; for in this last case the lessee admits an interest passed, and where an interest passes and is admitted which is determined, there is no estoppel. And here the fourth plea admitting the wife was seized for her life, an interest passed by the lease of her and her husband, which ended with her death. 8 D. & E.  
487, Blake v.  
Foster.

§ 4. So where A, tenant for life, and B in remainder in fee, leased by indenture to the plt., and A remained alive, and the court held it to be no estoppel, "for when the deed enures by passing of an interest, (as in this case it did) it should not be taken for any conclusion, no more than a lease for years of lessee for life, by deed indented, shall be an estoppel after his death; because at the commencement it took effect by way of passing of an interest." 6 Co. 15,  
Treport's  
case.

§ 5. It is a general rule, that the lessee by indenture is estopped to plead *nil habuit in tenementis*, or *nil demisit*, because he enjoys the estate and has a meritorious consideration. But may it not be a question, if he be barred when he is accountable to the owner for the rents and profits; for he then, in fact, receives no benefit or consideration under the lessor's lease, and if there be any reason for estopping the lessee at all, it is because he has accepted a lease from the lessor, and so thereby has admitted his right and power to lease. 2 Ld. Raym.  
1051.—6 D.  
& E. 62.—  
Co. Lit. 47.—  
1 Salk. 277.

## CH. 119.

## Art. 4.

Bull. N P.  
170. See  
Evidence.

§ 6. An action is brought for rent on an indenture ; if the deft. pleads he owes nothing, he is *estopped* to prove the plt. had nothing in the tenements ; for if he had pleaded specially, the plt. might have replied the indenture of lease and *estopped* him or demurred ; but if the deft. plead *nil habuit in tenementis*, and the plt. relies not on the *estoppel*, but replies *habuit in tenementis* &c., the jury is at liberty to find the truth of the case, for the court and jury are not *estopped* to come at the truth by the act of a party.

3 East, 233.

—Com. D.

Action F.—

2 Burr. 1087.

—Doug. 97.

—Cullen, 92.

—2 East,

151.—2 Ld.

Raym. 1536.

—Com. D.

Pleader

2 V. 2.—

1 Lev. 225.—

2 Inst. 673.—

3 Bos. & P.

149.—1 Ch.

on Pl. 109,

117.

§ 7. Covenant lies on policies of insurance under seal, against fire ; also on an annuity. Is the proper remedy where by deed an entire sum is to be paid by instalments, and the whole is not due, nor payment secured by a penalty. And if a party proceed in covenant (though secured by a penalty) for every repeated breach, he may ultimately recover damages beyond the penalty ; see *Bird v. Randal*, 3 Burr. 1351. And if the grantor of an annuity has become insolvent, the grantee ought to sue the action of covenant on the annuity deed, and not debt on the annuity bond. But usually covenant lies not but on a contract under seal. And it is said by Chitty, this action may be supported, though the covenantee do not sign the indenture in which named a party : cites *Lutw.* 305 ; *Com. D.* Covenant A 1 : must be exceptions ; as where the deed is invalid till all parties to it execute it, as is often the case. A stranger, says Chitty, 1 vol. 4, may have covenant on a deed not *inter partes*, indented or not. And on a single bond or deed poll, reciting the obligor had received of A £40 for the use of C and D, equally to be divided, to be paid at such times as should be thought best for the profit of C and D ; held, C and D might have separate actions for their respective moieties. See *Croke Eliz.* 729 ; 3 Bos. & P. 149 ; 1 Vent. 318 ; 1 Pow. on Con. 353.

ART. 4. *Covenants to pay taxes how construed*, see a. 1, s. 6, ante, only holds as to those in being when the covenant is made ; and see Revenue in the Index ; see Taxes and Warrants of Distress, Ch. 136, several cases.

Doug. 624,  
*Bradbury v.*  
*Wright.*

§ 1. *Replevin*. Deft. made consuance as bailiff of A, and stated, that B and C were seized in fee of the *locus in quo*, and by indenture, April 20, 1693, conveyed in *fee farm* to D, his heirs and assigns, paying yearly to C, his heirs and assigns, by half yearly payments, (times and places named,) £4. 17s. 6d., “without any deduction, defalcation, or abatement, for or in any respect whatsoever,” seizin delivered &c. ; then deduced a title to the *fee farm rent* from D to A, and stated £2. 8s. 9d. in arrear, for which the goods were distrained. Held, A was entitled to the full rent without deducting the land tax : 2. Distress is not incident to *fee farm*

rent as such, except the case is within, 4 Geo. II. ch. 14. **CH. 119.**  
 The court thought this was a *rent-seck* in its nature, and the party could distrain but under said statute: the court relied on 1 *Ld. Raym.* 317; *Carthew*, 135, 438; 1 *Salk.* 198; and 11 *Mod.* **Art. 4.**

§ 2. Held, a covenant to discharge from taxes, does extend to subsequent taxes of the same nature, but not to taxes of a different nature. And the court said, such a covenant if made in the year 1640, would not have freed the rent charge from the taxes imposed by 3 and 4 *W. & M.*, "because there were no parliamentary taxes in being or known at that time; but because there were such taxes in the year 1645, which was before the grant, therefore this covenant must be construed to extend to them." Cited *Carth.* 438; 5 *Mod.* 368; *Comb.* 211, 424, 466; 3 *Salk.* 340; 2 *Lev.* 68; 1 *Salk.* 221; 2 *Inst.* 76; *Ld. Raym.* 317. 1 *Salk.* 198,  
*Brewster v.*  
*Kitchell.*

§ 3. This was a lease for years, rendering rent "free and clear of all manner of taxes, charges, and impositions, whatsoever." Held, there would be no deduction for a land tax imposed by statute subsequent to the lease, "for the covenant extended to every old and new charge whatsoever." *Carth.* 135,  
*Giles v. Hooper.*—2 *Lev.* 68.

§ 4. Held a covenant in a lease to pay all taxes did not extend to a new parliamentary, but only to taxes then in use; but this covenant was made in 1635, before any land taxes by parliament by periodical assessments, were in use. 1 *Vent.* 223,  
*Davenant v.*  
*Bishop of*  
*Sarum.*

§ 5. This was debt for \$125, an assessment on the deft. as lessee for twenty-one years, of a lot of land &c. in the city of New York, under the 11th section in the city ordinance, for regulating buildings, streets, &c. which was passed in April 1801, and authorized by the legislature of the State. The deft. in 1806, as lessee, covenanted with the plts. to pay "all duties, taxes, assessments, impositions, and payments, that should, during the term, be issued or grow due, and payable out of and for the demised premises." And they were assessed the said sum of \$125, for opening and improving certain streets in the city. The court held, the deft. was liable to pay this assessment, made during his term; as it was made under a statute *in esse* at the time of the covenant. 10 *Johns. R.*  
96, 97, *The*  
*Mayor, Aldermen, &*  
*Commonalty*  
*of the City of*  
*N York v.*  
*Cashman.*

§ 6. Held, if a collector sell lands for taxes, he must conform to the law, and the purchaser must see that the collector has so acted; the vendee must prove the authority of the vendor. And the collector of the revenue of the United States, after removed from office, has no power to collect duties outstanding at the time of his removal; but his powers and duties devolved on his successor. This was an action of debt, brought in the district of Kentucky, for the penalty of an of- 4 *Cranch,*  
402, 414,  
*Stead v.*  
*Course.*

CH. 119. ficial bond given by the plt., with Obannon as his surety, dated September 13, 1796, the condition was to account for the excise duties on spirits distilled within &c., and account to the supervisor of the said district &c., or some other officer of the United States, duly authorized. First plea, general performance. Second, that Sthreshley's appointment was revoked July 1, 1797, and that he conducted well &c. to that time. This was denied in the replication. Held, as above.

Art. 4.  
4 Cranch,  
169, Sthresh-  
ley & al. v.  
U. States.

4 Cranch,  
403, 414,  
Stead's exrs.  
v. Course.

§ 7. By the tax laws of Georgia, 1790 and 1791, the collector was empowered only to sell lands on deficiency of personal estate; and then to sell only land enough to pay the tax in arrear; therefore the court held, that the sale of a whole tract, when a small part would have been sufficient to pay the taxes, was void. This case involves a very important principle; for it has been a common case in selling lands for taxes, even the direct taxes of Congress, to sell a very considerable estate for a tax of a dollar &c. This case was decided on a bill in equity, filed by Stead's executors, to have land sold to pay a debt due to their testator from John Rae, (see *Telfair v. Stead & al.*) and as being land he died seized of. Plea, it was sold to Daniel Course, for taxes &c. Held good in the Circuit Court, and the plt's. bill dismissed. This decree was reversed, and cause remanded with directions, the plt. answer over &c.

10 Johns. R.  
361.—See  
Ch. 49, a. 34.

§ 8. A collector called at A's house for his tax, and he was absent; the collector paid A's tax to the County. Held, as he did not pay it at A's request, and as he made no subsequent promise, the collector had no action against A for re-payment.

3 Wentw. 455,  
456, 457, 458.

§ 9. Forms of declarations, pleas, &c. Lessor against assignee of the lessee, for not paying rent, and not repairing. By surviving executor of lessor against assignee of the lessee, for not repairing, &c. &c. Other cases, 459, &c.

## CHAPTER CXX.

## COVENANT. WHAT IS A BREACH OF COVENANT, &amp;c.

**ART. 1.** *What is a breach of covenant or not, has already been incidentally stated in many cases.*

§ 1. As every express covenant must be by deed, every breach thereof must be by the covenantor's doing some act contrary to this deed, or his failing to do some act or thing, he is bound by his deed to do or perform; and as a covenant in law directs some act to be done by him who is bound by it, as to save harmless, or not to do some act, as not to commit waste, &c. every non-performance, in some cases, and every contravention, in others, of such covenant, is a breach of it.

§ 2. If I covenant generally, that a person shall quietly enjoy certain property, and I disturb him by title, or tortiously, it is a breach, but not if a stranger disturb him wrongfully; for such covenant is against the legal, not tortious acts of a stranger, for the reasons already mentioned.

§ 3. If in a lease the lessor reserve a right to enter and cut timber, making reasonable satisfaction to the lessee for any damage thereby occasioned to him, it is no breach for a third person wrongfully to cut down timber, if done without the lessor's consent or authority, however he may afterwards countenance the act. 6 D. & E. 66,  
Griffiths v.  
Brome.

§ 4. But if the lessor covenant with the lessee, that the land shall continue to him during the term of the value of \$200, it will be a breach if the lessor oust him, for then it cannot continue of such value to him. Jones, 360.—  
3 Com. D.  
249.

§ 5. So if a husband seized in right of the wife, covenant that they have a right to assure, it is a breach if she be a minor; as a right to assure means there is a legal capacity to do it. 2 Jones, 195,  
169.—1 Bac.  
642, Nash v.  
Ashton.

So if one covenant to convey land free of incumbrance, it is a breach of his covenant if he make a fraudulent conveyance, though that be void as to a purchaser, by the 27 of El. as to fraudulent conveyances, for this fraudulent conveyance, though voidable, is a charge on the estate; and no man shall excuse a fraudulent act by saying it is void. 2 Cro. 131,  
Gwenen v.  
Roll.

§ 6. So if a covenant be that land shall be free of all prior tithes, rights, and charges, and there be a former lease to the feoffee, as long as she shall remain sole, and if she married, her son to have it; she married, and her son entered; this is 1 Leon. 93.—  
3 Com. D.  
260.

**CH. 120.** a breach of the covenant, though this charge is both contingent and future. So if a covenant be that the land is discharged, and a rent charge was before granted to commence at a future day; as the land cannot be considered as discharged, so long as there is any incumbrance, present or future upon it.

*Art. 1.*

3 Com. D.  
250.—Sid. 48,  
178.—Raym.  
464.—Bul. N.  
P. 161.—1  
Bac. Abr. 462.

So it is a breach, if the covenantor be disabled to perform.

§ 7. So it is a breach of the covenant to perform according to the letter, and not the intent. As if one covenant to deliver a recognizance to be cancelled, it is a breach, if he extend it first, and then deliver it, and it is cancelled afterwards. So if one covenant to leave all the trees on the land, it is a breach to cut them down and leave them there. So to deliver grain for the plt's. cattle, it is breach to mix hops with them. So if a man covenant to deliver a horse, and he poisons him, and then delivers him, this is a breach.

10 Mod. 223. § 8. If A binds himself to pay B £10, he assigning over a chose in action to A, if A pay the £10, and no assignment is made by B, his covenant is broken, implied in the word *assigning*.

4 Co. 80,  
Noke's case.

§ 9. So if a bond be given for the performance of covenants, it is forfeited by a breach a covenant in law, as if land be demised (*demise*) to A, and he is evicted.

Saund. 316.  
—Bul. N. P.  
162, 163.

§ 10. If the deft., of his own shewing plead a false plea, the plt. shall have judgment without assigning a breach. As in debt on bond, the deft. prays oyer of the condition, which is to perform covenants in an indenture, and this he brings into court, and pleads, there are no covenants in it, on his part to be performed, then the plts. pray oyer, and several covenants appearing on the deft's. part to be performed by him, the plts. demurs. Saunders, for the deft., objected the plt. had demurred too soon; for he should have assigned a breach to maintain the action. But judgment for the plt., for it appeared judicially to the court, of the deft's. own showing, that he had pleaded a false plea, and therefore the plt. need not shew any matter of fact to support the action; but in this case the plt's. action was debt on a bond, and his declaration is good, and the first false step in pleading was on the deft's. part of his own shewing. But had the plt's. declaration been in covenant; a good breach must have been assigned, or his declaration had been bad, and the first false pleading on his part.

6 Com. D.  
340.

§ 11. So if a covenant be, that the deft. warrant the debt of A, the breach, he the deft. did not pay, is well enough, for his warranty of the debt was his covenant to pay it, and the breach is directly negating this covenant.

3 Com. D.  
250.—  
1 Leon. 169.

§ 12. A covenant is not broken by an act which by consequence may be a breach, if the breach do not actually follow,

As if A covenant to maintain every action in her name, without release or countermand ; if after such action commenced she marries, this is no breach, though the writ thereby is abatable if it be not abated by judgment ; but otherwise, if by judgment it be in fact abated. How non-performance is averred, sundry cases, 1 Ch. on Pl. 314 to 318.

CH. 120.  
Art. 1.

§ 13. So if A covenant that B shall enjoy a lease assigned free from arrears of rent. If rent be in arrear it is no breach, if no damages accrue thereby to B, by suit or otherwise ; hence the plt. must not only state in his declaration that the rent was behind, but also that he was disturbed in the enjoyment of the estate, or some way damnified. And the court took this distinction, "where the counterbond or covenant is given to save harmless from a penal bond before the condition broken, there if the penal sum be not paid at the day, and so the condition not preserved, the party to be saved harmless does by this become liable to the penalty, and so is damnified and the counterbond forfeited ; but if the counterbond be given after the condition of the obligation is broken, or to save harmless from a single bill without a penalty, then the counterbond cannot be sued without a special damnification : so here the rent remaining in arrear and not paid, is not a damage unless the plt. be sued or charged ; and if paid any time before such damage is incurred by the plt., it is sufficient."

Salk. 196,  
Griffith v.  
Harrison,  
and Tollard's  
case, 1 Roll.  
Abr. 433 —  
D'An. Abr.  
65.

§ 14. So a collateral thing shall not be a breach, though it be within the words of the covenant ; as if A covenant that B shall enjoy without any molestation, a suit in chancery against him to stay waste is no breach, though the bill be dismissed ; for it is a collateral thing and no disturbance in the demised premises.

3 Com. D.  
250.—3 Vin.  
218.

§ 15. So a covenant shall not be broken by a subsequent act to which the words do not extend ; as if a covenant be that A shall enjoy free from prior incumbrances, except estates for the life of B, and B afterwards grants by copy for three lives ; for though this extends beyond B's life, it is not a prior incumbrance.

3 Com. D.  
74.

§ 16. So a covenant shall not be broken by a thing that happens by the act of God, if it be repaired in convenient time ; as where the lessee covenants to repair a sea-wall, so that a meadow shall not be overflowed, and a sudden flood breaks it down, and the meadow is overflowed, it is no breach, if repaired in due time.

Dyer, 33 a.

§ 17. A breach thus, "that the deft. has not used the farm in a husband-like manner, but on the contrary has committed waste," his bad management not amounting to waste is no breach. But the deft.'s plea was, that he had not committed waste, but had used the farm in a husband-like manner, and

3 D. & E.  
307, Harris  
v. Mantle.  
See 1 Ch. on  
Pl. 329.—3  
D. & E. 637.

CH. 120. on this plea issue was taken. There seems no reason in this  
 Art. 2. case for not allowing the lessor to prove bad management, not  
 amounting to waste, but the circumstance the lease was not  
 expired, and then any bad management not waste was only to  
 the lessee's injury, as waste might be repaired by him.

Cowp. 125,  
 Hughes v.  
 Richman.—  
 Branch v.  
 Randolph,  
 cited 2 Hen.  
 & M. 453.

§ 18. If when I do an act, as sow barley on land I hire of  
 A for years, I covenant to permit him to do an act for his ad-  
 vantage, as to sow clover, it is no breach of covenant for me  
 to sow my barley and not give notice to him, for the permis-  
 sion being for his benefit, he must take notice at his peril, and  
 it is no part of my covenant to give him notice.

11 Mass. R.  
 302, Hopkins  
 v. Young.

§ 19. *What is a breach of a special covenant, and how de-  
 clared on.* Covenant broken, for that the deft., January 26,  
 1810, authorized the plt. by his deed &c. to use the deft's.  
 name in any suit or suits, which the plt. might think necessary  
 to bring to cause to be paid an execution issued in favour of  
 the Berkshire bank &c. against the deft. for \$—, and the deft.  
 covenanted with the plt. to transfer to him all judgments the  
 plt. might obtain in the deft's. name against said bank on de-  
 mand; plt. stated nine justice judgments, Feb. 3, 1800, he  
 recovered pursuant to said power for said purpose in the  
 deft's. name against said bank on their notes &c., the plt's.  
 property; that the bank appealed &c. to the Common Pleas  
 &c., and before entry of the actions therein the deft. released  
 said judgments &c. and though requested, and especially at  
 — on — the deft. neglected &c. to transfer said judg-  
 ments to the plt. and he lost them &c., and the deft. his said  
 covenant had not kept, but broken it; *oyer* prayed, and gen-  
 eral demurrer to the plt's. declaration, and two objections: 1.  
 Plt's. discharging the execution was a condition precedent,  
 and he had not averred a discharge: 2. Final judgments ob-  
 tained, so none the deft. could assign. Declaration adjudged  
 good. No condition precedent as to the judgments, the release  
 was a breach of the deft's. covenants.

ART. 2. *How the breach of covenant shall be assigned.*

Cro. El. 517.  
 —2 Stra. 814,  
 Moore v.  
 Jones.—  
 2 Ch. on Pl.  
 193.—2 Ld.  
 Raym. 1539.

§ 1. However the plt. may be entitled to an action for  
 breach of covenant, he cannot have judgment, unless in his  
 declaration he assign a proper breach of it. The plt. in his  
 declaration must expressly state the covenant was made by  
 deed, and it is not sufficient for the plt. to allege that the deft.  
*per scriptum suum factum*; but *factum*, a substantive, means a  
 deed.

Co. Lit.  
 282 a.—  
 Cowp. 282,  
 725.

§ 2. So where the plt. declares on a deed, he must make  
 a profert of it; and in pleading in covenant, as in other cases,  
 the party must recollect the general rule, that the fact alleged  
 must always be substantially proved, and the evidence must  
 substantially follow the allegations; hence the allegation must  
 always have regard to the evidence.

§ 3. In forming his declaration the plt. in several cases has an election to declare generally, or specially, to declare on the words, or on the legal operation ; so he may ground his action on a part of a contract sufficient to support the right of action, or on the whole instrument, if it tend not too much to prolixity. But in some cases where the instrument is very long and contains various matters, the court will not allow a declaration at large on it. So the plt. may sue for the penalty, or go on the covenants. In declaring on covenants and in assigning breaches of them there are many things to be attended to, and generally may be reduced to the following rules :

§ 4. First rule. "Where the covenant is general, a general assignment of a breach is sufficient." As where a covenant was not to buy or sell for two years, without the plt's. leave, and the breach assigned was, "that the deft. on divers days and times, between such a day and such a day, had sold to A and several other persons unknown, goods to the value of £100;" held sufficient, and a recovery in the action may be pleaded in bar to another action for the same cause. But the breach must ever agree in sense and substance with the contract. 1 Ch. on Pl. 328.

§ 5. Second rule. "But the most general assignment is in the words of the covenant itself." As if the lessor covenant he is seized in fee and hath full power to lease, the plt. may allege, "that the lessor was not seized in fee or had not full power to lease, and then the deft. must shew he was seized in fee, or had full power to lease, by shewing what estate he had at the time of making the lease ; this puts the plt. on shewing a special title in some third person. But the rules as to general and special assignments both have their exceptions. Need not state a stranger's title.

§ 6. Third rule. But the general breach is not always sufficient, but a special breach is often necessary, shewing how, when, by whom, &c. the breach is. As in covenant for quiet enjoyment the breach must allege how, and by whom, and under what title the party is disturbed : so as to incumbrances and warranties ; for when the covenantor covenants the estate is free of incumbrances, and that he will warrant and defend it, he does not covenant, (as before stated,) that it is free of all incumbrances whatever, not those by tort, but only those by title, nor does he warrant against every kind of claim, as not against illegal claims, but only against legal ones by elder and better title ; therefore, it is necessary the plt. shew what the incumbrance is, and what the claim set up is, that the court may see that it is not of this first kind, but the last.

Ch. 120.  
Art. 2.

Dougl. 193,  
667, 767.—  
5 Com. D.  
336.  
Dougl. 665,  
669, Bristow  
v. Wright.—  
1 Esp. 330.—  
1 Phil. Evid.  
166.

1 Esp. 361,  
Farrow v.  
Chevalier,  
1 Salk. 139.  
—Sir T.  
Jones, 129.—  
1 Esp. 362.

Muscot v.  
Ballet, Cro.  
J. 369.—  
9 Co. 60,  
61.—Cro. J.  
170, Han-  
cock v. Field.  
—2 Mod.  
139.—2  
Saund. 181 b,  
n. 10.—Com.  
D. Pleader C  
47. See Har-  
ris v. Mantle,  
a. 1, s. 17.  
4 Bac. Abr.  
90.—5 Com.  
D. 339.—Sal-  
man v. Brad-  
shaw, Cro.  
J. 304.—  
2 Mass. R.  
433.—Craghill  
& al. v. Page,  
2 Hen. & M.  
446.

## CH. 120.

## Art. 2.

Dyer, 229.—  
Hob. 69, 107.  
—1 Bac. Abr.  
92.—1 Esp.  
264.

2 Mod. 176,  
Harmon's  
case.—4 Bac.  
Abr. 88.

4 Bac. Abr.  
91.—3 Lev.  
170, Proctor  
v. Burdet.—  
Bac. Abr.  
546.—3 Mod.  
69, 70.—Lev.  
94, &c.,  
French v.  
Pierce.—1  
Ch. on Pl.  
326, 330.—  
Lutw. 829.—  
2 Roll. Abr.  
738.—Raym.  
9, 400.

Cowp. 665,  
Dundas v. Ld.  
Weymouth ;  
cited 1 Ch. on  
Pl. 303.—  
Cro. Jam.  
298.—Cowp.  
727.

2 Ch. on Pl.  
177.—Proc-  
tor v. Burdet,  
3 Mod. 69.—  
1 Esp. 362,  
Nicholas v.  
Pullen.

§ 7. Fourth rule. So where covenants are to do matters in law, as to convey estates, to discharge an obligation, to ratify or confirm, &c. then it must be pleaded specially, because it being matter in law to be performed, it ought to be exhibited to the court to see if it will be legally performed, who are judges of the law ; and not the jury, who are judges of the fact only. As if the covenant or condition be to convey an estate, in pleading, it must be shewn how, or by what manner of conveyance it is done, that the judges may see it is legally done.

§ 8. In an action of covenant the breach assigned was, that the deft. did not repair. The plea was, that he did repair, and issue ; and it was held well after verdict ; for the *how* is matter of form, and is bad only on special demurrer.

§ 9. Fifth rule, *is to avoid prolixity in pleadings, where it can be done*. In affirmative pleas the law allows of general pleading, where particulars would be many. As on a bond to perform covenants on an indenture of apprenticeship for finding meat, drink, washing, lodging, and other necessities, the allegation that he found him meat, drink, washing, lodging, and other necessities, in the words of the covenant, without stating what, or how much, was held to be sufficient, because in the words of the covenant, and particulars would be many and tend to prolixity. So on a covenant to supply many officers in an army, an averment he supplied such a sum is sufficient. 1 Stra. 581 ; see Ch. 40, a. 26, s. 7 ; 8 D. & E. 459 ; and Ch. 180, a. 1, s. 20.

§ 11. In this case the whole court was of opinion, that in covenant, it was sufficient for the plt. in his declaration, to set out that the deft., by indenture, had demised certain premises therein mentioned, without stating them particularly, subject (among other things) to such a proviso ; stating the substance of the covenant and breach. Where the breach is well alleged, the plt. need not conclude, and so in this the deft. has not kept his covenant &c., for it is but repetition. See 1 Saund. 233, n. 2 ; 2 Saund. 305 ; 1 B. & P. 367 ; 6 Johns. R. 237.

§ 12. Sixth rule is, when the covenant is broken by the act of a third person, it is proper to state the breach specially, for that act must be stated ; but it may be sometimes done in the replication. As where a covenant was to save harmless from all suits and lawful evictions ; the deft. pleaded performance ; the plt. replied, that one J. S. sued out a writ of possession, duly executed, &c. and by virtue thereof expelled him ; the deft. demurred ; and judgment for him ; for in *due manner* is not sufficient, without shewing particulars. The writ of possession always cites the judgment, and that at least should be set out by the replication. Had the deft. demur-

red, in this case, for an insufficient breach in the declaration, CH. 120.  
there is nothing in this case to shew the breach, if well assign- Art. 2.  
ed, was in season in the replication.

§ 13. Seventh rule. The breach must be clearly within the covenant. Therefore if the lessee covenant not to cut down more timber than is necessary for repairs of buildings, the lessor must assign the breach, that the lessee "had cut down more timber than was necessary for repairs of buildings;" to say he has cut down trees, to the value of £10, and converted them to his own use, is error even after verdict; for this breach is not within the covenant; and he also may perhaps cut to the value of £10, and not break his covenant, for so much or more might necessary repairs be.

Style, 5, Win-  
ford v. Sher-  
wood.

§ 14. So where the lessee covenanted that he, his execu-  
tors, and assigns, would repair a mill; and breach assigned,  
the lessee, his executors, and assigns, did not repair. This is  
ill for the last reason. The breach ought to be in the dis-  
junctive, or his assigns; for if any of them repaired it was  
enough. But *quære* if *and* should not have been read *or*. In  
a contract or statute it would be, if necessary to effectuate the  
intentions of the parties. It is true these cannot be amended  
as a plea may. So in a will, or read *and*. 1 Wils. 140.

Cro. El. 348,  
Colt v. Howe.

§ 15. In this case, after verdict, the court understood "*and*,"  
in a plea, to mean "*or*," aided by another word in the latter  
part of the same sentence. 6 D. & E. 722; Co. L. 207; 1  
Stra. 594; 2 Saund. 129, 132.

Ch. 125, a. 1,  
s. 13; a. 7, s.  
1.

8 Mod. 239,  
Burgess v.  
Bracher.

§ 16. Eighth rule. If there be a proviso in a deed defeat-  
ing it, the plt. need not state it in his declaration, but leave it  
to the deft. to plead it. As where the deft. covenanted, by  
such a day to deliver so much saltpetre, provided if he was  
prevented by the sea the deed should be void. But it is oth-  
erwise if the proviso or exception make a part of the cove-  
nant or contract; for the plt's. declaration is on the whole  
covenant, at least all the words and sentences that constitute  
the contract sued upon, and when the exception is a part of  
it, to state the contract without the exception is not to state  
the same contract. As if the lessee's covenant be to repair  
the fences, except on the east side of the close leased; the  
breach was assigned in not repairing according to the form of  
the covenant; the plt., in his declaration, must set out the  
fence not repaired is not the fence excepted; and so he must  
state the covenant with the exception making a part of it;  
with the exception it is, in fact, a covenant to fence *three sides*  
of the close, without it, *four sides*. 1 Ch. on Pl. 300, 301,  
&c.; 6 East, 567; 8 East, 7, Miles v. Sheward.

1 Esp. 364,  
Eliot v. Blake.  
—1 Lev. 88.  
—1 D. & E.  
645.—6 East,  
570.—2 East,  
2, Perry v.  
Porter.—  
2 Bos. & P.  
119, White  
v. Wilson.—  
2 Phil. Ev. 1.  
—3 D. & E.  
531.—3 Bos.  
& P. 582.—  
9 East, 147.

§ 17. Ninth rule. If the covenantor engage to do one of  
Noon; also 1 Stra. 594, cited 1 Ch. on Pl. 316, 327.—Cro. El. 348.—1

1 Leon. 250,  
Sherwood v.  
Stra. 231.

**CH. 120.** two things, in the disjunctive, the breach must be assigned as  
**Art. 2.** to both. As if the lessee covenant he will not take wood without the assent *or* the assignment of the lessor, or his assigns, it is no breach to state the lessee took wood without the assignment of the lessor or his assigns, for it might be with his assent. But the debtor has paid when he has caused to be paid. But are cases where *or* is read *and*, see *or & and*, Index. 1 Saund. 235, a. 6; 1 Salk. 139; and 5 Mod. 133.

**Cro. El. 917,** § 18. Tenth rule. If the breach be by the act of a third person, the plt. must state it was under a claim of title, or by  
**Lanning v. Lovering.** lawful act; as generally the covenantor's covenant does not extend to the unlawful acts of others, as has been stated above; that is, if the plt. state the third person's act, he must state it to be lawful; for in some cases, as on covenant of seizin or right &c., the plt. need not state the third person's act in his declaration, but only negative generally the words of the covenant, as that the covenantor was not lawfully seized in fee &c.

**3 Mod. 135,** § 19. When the lessor covenanted the lessee should hold  
**Mosse v. Archer.** the land discharged of tithes; and the breach assigned was, that the parson had recovered them in an action; on demurrer, for that this breach was insufficiently assigned, as the plt. had not alleged that the suit was lawful, or that the tithes were due; for the covenant did not extend to illegal suits; and because the parson recovered in an action, it did not follow the tithes were legally due.

§ 20. This rule applies to most cases of quiet enjoyment; and to many other cases in which the grantor or lessor engages the grantee or lessee, his heirs, assigns, &c. shall hold the estate undisturbed; but not against trespasses, for which the party in possession has his remedy against the wrongdoers, or against persons claiming under the grantee or lessee himself, but only against good and elder titles, as in the cases of Kirby v. Hansaker, Noke's case, and other cases before stated.

**2 Mod. 213,** § 21. But after verdict the court will intend title in the disturber, if it appears he recovered by judgment of court in the  
**Mayor v. Griggs.** plt's. declaration; for the fact he recovered by judgment of court being alleged, it shall be intended it was proved, after verdict.

**1 Esp. 367,** § 22. Eleventh rule. The breach may be assigned, by a  
**Proctor v. Newton,** person's act claiming by elder title, without stating what that title is, for the plt. may not know the title of the person expelling him; hence if it appear by the declaration, that the claim is by elder title, and not under the plt. himself, it is sufficient. As where the plt. declared on a lease to him for a year, and the breach assigned was, that J. S., who had title by virtue of a lease made to him of the same land before

that to the plt., had entered and evicted the plt., it is sufficient, and so decided on a motion in arrest of judgment; for the title appears sufficiently to be an elder title, and not under the plt., though not so stated in express words. And one reason for stating the stranger's title is, to shew he does not hold under the plt.

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3 Mod. 135.

§ 23. Twelfth rule. Where the breach is by a person included in the covenant, it is unnecessary to state any title as to him; for the covenant being against his acts, particularly his *ouster*, &c., is a breach by the express provision of the contract itself. As if the lessor covenant, "that during the term, neither he, his heirs, or executors, shall interrupt the lessee," and the executors of the lessor enter, the breach need not state any title in them, as they are included in the covenant; and, as in this case, stating an elder title in them, or their not claiming under the plt., would be foreign and superfluous.

1 Esp. 368,  
force v.  
Vines.

§ 24. Thirteenth rule. Where a thing is to be done by one, or his assigns, the breach must be, that it was not done by him or them; for to say it was not done by one, is no breach, as it might be by the other: but when an act is to be done to one or his assigns, it is a good breach to say it was not done to him, without mentioning his assigns; for an assignment shall be intended to be done to him, and if he assign his interest, then to his assignee; and if he assign over his interest, it ought to be shewn on the other side.

1 Salk. 139,  
Smith v.  
Sharp.—5  
Com. D. 340.

§ 25. But the first part of this rule has exceptions. As where the lessee covenanted, that he, his heirs, and assigns, every year, should plant eight crabstocks; the breach assigned was, that he had not done it such a year, and held well; for the action being against the lessee himself, an assignment was not to be presumed.

1 Stra. 228,  
Gyse v. Ellis.  
—Bul N.P.  
164, Finch's  
case.—5  
Com. D. 341.

§ 26. Fourteenth rule. There can be no apportionment of the demand in covenant to pay a certain sum; for the covenant is entire, and the breach must follow the covenant, as in *Rea v. Burnet*, in charter-party. So if one is to have 2s. a quire for writing, a breach is ill, stating non-payment for so many quires and *three sheets*; but then the plt. may remit the surplus, and take judgment for the true sum,—with this distinction, if the demand be not fixed at a certain amount, by the deed, but depends on something extrinsic, a remitter may be entered, but if the demand be so fixed, as if the covenant be to pay £20, there can be *no remitter*. In this case, in which the remitter was allowed, the deft. covenanted to pay the plt. £35 a hundred for every hundred of wood, in such a place, and the plt. stated he delivered so many hundred *and a half*, which came to £182. 10s. The deft. demurred, and the

Allen, 19,  
Needler v.  
Guist.—Salk.  
658, Incledon  
v. Cripps;  
cited 1 Salk.  
139.—1  
Lutw. 459,  
539.—1 Vent.  
129.—1  
Show. 8, 9.—  
Cro. Car. 137,  
436, 437.—1  
Saund 282,  
285.—5 Mod.  
213, &c.—  
Hob. 178.—  
Dyer, 56.—  
10 H. VI. 6.

CH. 120. above distinction was taken. So if more rent be demanded than is due, the surplus may be remitted, for the same reason. Art. 2. This distinction is clearly settled in many other books, and the reason is clear. In the first case the sum the plt. claims is fixed solely by his deed; and if he claim more than that, he does not claim on his deed, but varies from it; but where a deed only gives a right to a sum or sums, as to annual rents, and by matter extrinsic, as by evidences of the time of enjoyment &c. the sum or sums must be calculated, then if the plt. demand more than is due, he may remit the surplus, as he is to recover on trial what appears on evidence to be due; nor is this variance inconsistent with the deed, for that only establishes the principles of computation, and no certain sum.

2 Mod. 33,  
Smith v.  
Shelberry &  
al.—Ch. 118.

§ 27. Fifteenth rule. Reciprocal covenants cannot be pleaded one in bar of another, therefore, in assigning a breach on the deft's. part it is necessary to aver performance on the plt's. part, but otherwise in conditional and dependent covenants; and in concurrent covenants an offer or readiness to perform must be alleged.

1 Stra. 229,  
Aleberry v.  
Walby.—  
5 Com. D.  
340.—See  
Ch. 123, a. 2,  
s. 12.

§ 28. Sixteenth rule. *If the plt. unnecessarily state his title and mistake it, he fails.* At first this was deemed surplusage, as where the plt. unnecessarily set out his title and imperfectly, it was ruled to be surplusage and rejected; as where in stating his title the plt. omitted the party under whom he claimed by descent, and where he might have declared generally, that he demised. And there is a difference between stating a title imperfectly, as above, and stating it wrong, as in *Polyblank v. Hawkins*; the plt. in stating his title set forth that one Strobridge, who was seized in fee, made the lease in question; and that on his death the estate in reversion descended to the plt's. wife as his heir at law, whereupon the plt. became seized of the reversion as of freehold in right of his said wife; on special demurrer the declaration was held to be bad; for by the plt's. own shewing the estate he had was in him and his wife in her right as of fee, and not as stated of freehold. The special cause of demurrer in this case was, "that it is stated in the said declaration, that the plt. was seized of the reversion of the said demised premises in his *demesne* as of freehold in right of Joanna his wife; whereas it ought to have been alleged that the plt. and Joanna his wife, in right of the said Joanna were seized in their *demesne* as of fee of and in the said demised premises." Buller J. said, it is the practice to state the exact title, and it is a fault in form to have departed from it. The court allowed the plt. to amend, paying costs. As the ancestor of the plt's. wife made the lease declared on, it was necessary for the plt. to state his title to shew how he was connected with the lease and covenants in it.

Dougl. 328,  
329, Poly-  
blank v.  
Hawkins.

He here claimed one title and shewed he had another,—and said Hawkins was assignee of the original lessee. In this case too the reversion descended to the wife, to which the covenant sued appertained, but the husband alone sued it.

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Art. 2.

§ 29. Seventeenth rule is, on a joint covenant by several, all must be joined in the action, or the declaration will be bad on *oyer* and demurrer. And if one be named in the indenture who has not sealed, he must be excluded by averment; yet if the action be brought against part only of the covenantors, advantage must be taken by pleading in abatement. But where it is brought by one covenantee where there are several, advantage may be taken of it by craving *oyer* and demurrer generally.

2 Stra. 1146,  
Vernon v.  
Jefferies.—  
Bull. N. P.  
158.

§ 30. Eighteenth rule. Where there is no breach on the deft's. part till something be done by the plt. or others &c. the declaration must aver this something is performed. This rule holds in very many cases, as in all cases of conditional and dependent covenants, where the performance on the plt's. part is a condition precedent, and must be performed before there can be any breach on the deft's. part, unless dispensed with by his act or in some other way. So in many other cases in which something is to be done, or some event is to happen before the deft. is to be called upon to perform, this something must be stated to be done, or this event to have happened, before any act lies against the deft.

Hob. 217,  
Crookhay v.  
Woodward.

So when the deft. covenanted to satisfy the plt. for all monies, the deft's. son should embezzle while apprentice to the plt., within three months after proof and request made. The plt. in his declaration stated the embezzlement and request, but not the time or proof; after verdict for the plt's. judgment was arrested for this fault; the proof also was made a condition precedent, a circumstance to precede the right of action against the deft.

§ 31. Nineteenth rule. *The penalty once recovered, the covenant is at an end.* Wherever a covenant is secured by a penalty, the plt. may elect to sue for the penalty, or for damages for the breach of covenants, for the penalty in an action of debt, and for the damages in an action of covenant broken; but according to Lord Mansfield and the authorities generally, after a recovery of the penalty, the party "cannot again resort to the covenant, because the penalty is a satisfaction for the whole;" but "he may waive the penalty and proceed on the covenant and recover more or less than the penalty *toties quoties*," and to increase damages assign a breach on every covenant in his declaration or replication, in order to enable the court to assess damages for each breach. 5 Taun. R. 386, 392.

4 Burr. 2225,  
&c. Lowe v.  
Peers.

2 Co. 4a.

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4 Burr. 2228,  
Lowe v.  
Peers.

§ 32. Twentieth rule. If the penalty be but *in terrorem*, the plt. may state and prove, and the jury assess, real damages, for where the penalty is as a punishment, a court of equity in England and our courts by our statutes will relieve. As if the covenant be "not to plough meadow," and a penalty of £50 an acre is annexed, either court will relieve, for the penalty is as a punishment. But where the penalty is by agreement, a compensation, as if a covenant be "to pay £5 for every acre of meadow the lessee shall plough," this is a part of the agreement and compensation agreed on, and not strictly the penalty. "It is the particular liquidated sum agreed upon by the parties, and is the proper *quantum* of damages which the jury ought to find." Hence, when the deft. covenanted not to marry any one except the plt., and if he did, that he should pay her £1000, this sum the jury must find as the settled *quantum* of damages.

1 Bac. Abr.  
544.—10  
Mod. 227 —  
1 Esp. 331.—  
Brigstock v.  
Stannion,  
1 Ld. Raym.  
107.—2 Co.  
4 a, Manser's  
case.—  
1 Saund. 50,  
s. 1.—Com.  
D. Pleader, C  
33.

§ 33. Twenty-first rule. In debt on bond for the performance of covenants a certain breach must be assigned, and but one at common law; because one breach worked a forfeiture of the penalty, and more assigned were superfluous; but in covenant the plt. may assign as many breaches as exist, "because all is recoverable in damages, and these shall be what the plt. can prove he has sustained." And to recover damages for several breaches he must state and prove them. Also in covenant in many cases a breach may be assigned "in the words of the covenant;" but according to its meaning or legal operation is best. See also 1 Ch. on Pl. 330.

8 & 9 of  
W. III. not  
adopted here.

§ 34. From these rules, 19 & 20, naturally result two principles: 1. If the plt. go only for the penalty or the fixed agreed compensation, it is sufficient for him to state and prove such matters only as will entitle him to recover the one or the other: 2. But if he go for the damages at large, and apportioned to his case, and real wrongs, then he must state and prove all such matters as he is entitled to recover damages for.

§ 35. By the act of the 8 & 9th William III. c. 10, "in debt on bond or penal sum for the performance of covenants, the plt. may assign as many breaches as he pleases, and the jury shall assess damages for such as have been broken; and in case of judgment on demurrer or by *nil dicit*, the plt. may suggest on the roll as many breaches as he shall think fit, upon which a writ of inquiry shall go." For the construction of this act, see Ch. 28, a. 5, as to damages. This act was never adopted in this State it is understood; because about the same time, 1698, the legislature of the Province passed an act empowering the law courts to chancer all penalties annexed to contracts; this act included the substance of the English act, and more. On the English act on demurrer the judgment is

1 Esp. 333.—  
2 Wils. 377.

for the penalty, the breaches assigned, and a writ of inquiry goes, and execution for the damages. CH. 120.  
Art. 3.

§ 36. Twenty-second rule. Breach for not repairing &c. negatively without stating in what, is form in the first instance, and cured by verdict. As if A lease to B for years, and B covenant to repair during the term, and at the end of the term to leave the premises well repaired, in an action on this covenant the plt. may assign for a breach that he did not leave them well repaired at the end of the term, and if the deft. plead, that he did at the end of the term deliver them up well repaired, then if the plt. will assign a breach, he must shew particularly in what the repairs were wanting, so that the deft. may give a particular answer thereto.

§ 37. In covenant the breach assigned was, that the deft. did not repair, he pleaded generally that he repaired, and thereof put himself on the country; this was held good after verdict. 2 Mod. 176,  
Harman's  
case.—  
2 Barnes,  
282.—Hob.  
296.—2 Co.  
4.—5 Com.  
D. 339. *Ld. Raym.* 168, 170, 284, 594, 1416, 1449. *Stra.* 681, *White v. Cleaver*, in debt on bond conditioned to indemnify the plt., the deft. on *oyer* pleaded generally, that he kept indemnified, without shewing how. Held to be form, and to be specially demurred to, "for the substance is the saving harmless, and how that was done is but matter of form." This case goes rather further than the rule; for in this the deft. pleaded in the affirmative that he did keep indemnified without shewing how,—*non damnificatus* in the negative had been less exceptionable.

§ 38. So if A grant a rent to B and his heirs, for the life of C and to his use, and covenant with B to pay it to C's use, and in covenant B states a breach in not paying the rent to him to the use of C, this breach in the words of the covenant is well assigned, though a negative pregnant, and said if paid to C, which would have been a performance B ought to have pleaded it. A covenant to permit one to remove trees, breach did not permit or did obstruct, is good. 1 Bac. Abr.  
546, *Boscawin v.*  
*Cook*.

§ 39. In covenant the safest way is to recite the deed according to its legal operation, though different from the words, and it is enough to recite so much of it as contains the covenant. 5 Com. D.  
339.—*Show.*  
252.—*Dougl.*  
667.—*Selw.*  
88.—*Cro.*  
*Car.* 188. *5 Com. D.* 603. So a recital in the words of the deed do not prejudice, though uncertain, as messuage or tenement; nor does a mis-recital in an immaterial part, affect the case. When the plt. must excuse his own performance, he must state his excuse, and his readiness to perform, and the particular circumstances that make his excuse. *1 Ch. on Pl.* 317.

#### ART. 3. *Sundry cases, breaches well assigned.*

§ 1. In covenant the plt. declared on a charter-party, by which he, being master of a ship, was to pay two parts of the 1 Bac. Abr.  
547.

CH. 120. port charges, and the defts. one third part; that he the  
 Art. 3. plt. sailed from L to C, and then paid all the port charges, to  
 wit, two thirds for himself, and the other part for the deft.,  
 and that the deft. had not repaid him. The court held, that  
 this breach is well assigned, for it was intended the plt. was  
 obliged to pay it or have the ship detained in port.

Carth. 124,  
 Hawkings v.  
 Vincent.

§ 2. In covenant by which the deft. was to make a good title, by such a day, to the satisfaction of the plt. or his counsel, breach assigned in the words of the covenant, though objected that the covenant being in the disjunctive, namely, *to satisfy the plt. or his counsel*, he had an election, and hence the plt. ought to have given notice who his counsel was, before which time the deft. could not satisfy him: but held, the breach, being in the words of the covenant, was sufficient; and if the truth was, that the deft. did not know who the plt's. counsel was, he should have stated it. Also *Smith v. Sharp*.

Colt v. How.  
 2 Mod. 311,  
 Aster v. Ma-  
 zeen.

§ 3. The deft. covenanted: 1. That he was seized in fee of the premises: 2. That he would free them of all incumbrances: and 3. For quiet enjoyment. In covenant the plt. assigned a breach on the entry and eviction by A, and concluded, and so the deft. had broken his covenant. Held well on demurrer, though in the singular number, for *conventio is nomen collectivum*, and the breach assigned related to all three covenants.

Bul. N. P.  
 163, Busher  
 v. Phillips.

§ 4. In debt on a bail-bond, the plt. stated, that A, and B, and the deft., became jointly and severally bound for A's appearance; that A did not appear, and that the deft. had not paid. A special demurrer; because it was not averred the money was not paid by A and B. On a search of precedents, judgment was for the plt.; and if paid it was the deft's. interest to shew it.

3 East, 491,  
 Howes v.  
 Brushfield.

§ 5. The seller of an estate covenants with the purchaser, that he shall enjoy and receive the rent, &c. without any action, &c. or interruption of the seller, or those claiming from him, or by, through, or with, his or their acts, means, default, &c.; and if the plt. assign a breach in respect to certain quit-rents in arrears before and at the time of the conveyance, though not stated to have accrued while the seller was tenant of the premises, this breach is well assigned; for the deft. covenanted against incumbrances by his default, and if in arrear in his life time, it is a consequence of law that it was by his default, that is, by his default in respect of the party with whom he covenants to leave the estate unincumbered,—he has left it with an incumbrance he ought to have discharged.

20 Mod. 142,  
 Hachet v.  
 Glover.—

§ 6. *Breach as to goods, &c.* Covenant:—the plt. declared that the deft. for £10 sold him goods, and covenanted to de-

Cro. El. 914, Chantflower v. Priestley.—Com. D. Pleader, C. 47, C. 49.—Vaugh. 118.

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Art. 3.

send and warrant them to the plt. against all persons ; and assigns for breach of the covenant, that at the time of the sale the deft. had neither the possession nor the property of the goods. The deft. demurred, and judgment for the plt., for the breach is well assigned. On error brought, it was urged, this was no breach ; for the intention was only to secure the possession, and so till eviction there was no breach of the covenant : cited Co. L. 365, as where it is said, an eviction is of the very nature of a warranty, and though a *warrantia chartæ*, may be brought before eviction, it is also a charge upon the land ; that if one have only an equitable interest in goods, sells them, and covenants he is the owner of them, and will warrant them &c., the vendee shall not have covenant till evicted ; that he shall not bring covenant, and say the property, to wit, *the legal title*, was in another at the time of the sale. 2 Saund. 175 ; Hobart, 34, 35, 51 ; 1 Roll. Rep. 519 ; Moore, 175 ; Dyer, 328. These authorities generally shew, that a covenant for quiet enjoyment against all interruptions, extends only to legal interruptions. This the court conceded ; but said it was not to the point.

On the plt's. part it was urged, since it was confessed by the deft's. demurrer that when he sold the goods he had neither the possession nor the property, the buyer could not take possession of them without exposing himself to an action of *trover*. The court decided, the plt. could not use the goods without being liable to *trover*, which is a damage ; but if the deft. had had the equitable right, and another the legal one, it had been proper for the plt. to have stated it to the court in pleading. Judgment was affirmed.

§ 7. If the deft. covenant to shew a sufficient record, it is a good breach to state he did not shew a good record.

5 Com. D.  
Pleaser, C.46.

§ 8. So if the deft. covenant that the plt. and wife shall hold and enjoy the lands, it is a good breach to state the husband is ousted, for he has the entire possession during the coverture.

2 Cro. 383,  
Penning's  
case.

A and B his wife leased lands to C for seven, fourteen, or twenty-one years, at his election ; he covenanted to pay them, their executors, &c. the rent during the term. C entered and continued the possession. A died, and B married D, D and B sued for rent in arrear the first seven years, and assigned for breach that C had not paid them ; and held well.

2 Burr. 1032,  
Ferguson v.  
Cornish.

§ 9. In an action of covenant the plt. stated a lease granted A by the deft., which by several assignments came to the plt. In this lease the deft. covenanted for *quiet enjoyment* without any interruption from him or any other person. In

4 D. & E. 617,  
Foster v.  
Pierson ; cit-  
ed Dudley v.  
Folliot, 3 D.  
& E. 580.—  
v. Hele.—2

Hob. 34, case of Tisdale.—Jordan v. Twells, Ann. 171—Dyer, 328, Wotton Saund. 181.—1 Lev. 301.—1 Mod. 294, 101.—3 D. & E. 307.

CH. 120. assigning the breach the plt. stated, that at the time of the demise to the plt., and thence to the time of the plt's. eviction, one J. B. Pierson "had lawful right and title to the premises," and "having such lawful title" to them, on —, entered into and upon the possession thereof, and evicted &c. the plt. &c. kept him out. The deft. demurred, and assigned for causes of demurrer: 1. That it was not alleged in the declaration that said J. B., at the time of said eviction, or any time before, had established his title by any legal process: or 2. That he so entered under any legal process: 3. That it should have been alleged he so entered under legal process, and that it did not sufficiently appear what right he had to enter and evict. The court held, this breach was well assigned, without shewing what title J. B. Pierson had, or that he evicted the plt. by legal process; and as to his right of entry, the court thought the words, "*having lawful right and title*" entered, clearly implied he had a right of entry; and Buller J. said, a right of entry in J. B. Pierson must have been proved at the trial, or the plt. must have failed in proving his allegation. This and the following cases confirm the principles laid down in the 11th rule, above, that it is enough for the plt. generally to state sufficient to shew the third person entered on an elder and legal title.

3 D. & E. 278,  
Hodgson v. E.  
L. Company.

§ 10. In an action of covenant for quiet enjoyment the plt. may state generally, that A. B. lawfully claiming title under the deft., entered by virtue of such title on the plt., without stating the particulars of A. B's. title; and if the plt. so assign a breach, and conclude, so the deft. did not keep his covenant, the deft. cannot plead *non fregit conventionem*, because two negatives. The lands were in the E. Indies. There were cited on this last point, *Pitt v. Russell*, 3 Lev. 19; *Boone v. Eyre*, 2 W. Bl. 1312; and *Walsingham v. Coombe*, 1 Lev. 183; the breach was held to be well assigned, mainly on the cases of *Foster v. Pierson*; *Aster v. Mazeen*, 2 Mod. 311; 1 Lev. 104. Another plea in this case was demurred to, because it attempted to set up a parol agreement in opposition to a deed; and in support of the demurrer were cited, *Goodwin v. Crowle*, Cowp. 358; *Blake's case*, 6 Co. 43; *Preston v. Christmas*, 2 Wils. 86; *Rogers v. Payne*, 376; *Littler v. Holland*, 3 D. & E. 590.

4 Mass. R.  
349, 353,  
Hamilton v.  
Cutts & al.,  
exrs.—See  
Ch. 115, a. 8,  
s. 4, this case  
stated.

§ 11. *Covenant broken*. On motion for new trial, judgment on the verdict. Parol evidence allowed to prove the eviction or ouster, and though the dispossession take place with the consent of the tenant in possession, it is enough it is an eviction; but then he must prove the person had a right to oust him. The plt., in this case, did not state the title as between Moore and M'Creales, and in *Hodgson v. East India*

Company; the court said, it was impossible for the plt. to set forth the particulars of the titles of those who entered upon him; he could know them only by inspection of their title deeds, to which he could have no access. CH. 120.  
Art. 4.

§ 12. In covenant the breaches were assigned generally against the deft., for having made cordage for divers persons, and for employing other persons than the plts. to make cordage for his friends, &c. Held, to be well assigned; though no particular persons were named, nor the quantities or kinds of cordage mentioned &c., such facts lying more particularly within the deft's. knowledge. 8 East, 80,  
Gale & al. v.  
Reed.—3 Bos  
& P. 366.—  
4 Dall. 440.

§ 13. The plt. assigned a breach in the condition of a bond in general terms, to wit, that the deft. had collected \$1000, plt's. money, and refused to account for it, or pay it over. Held, a good breach. So if it be he embezzled \$1000, plt's. money, and refused to account. So it is enough if the breach be assigned generally, negating the condition of the bond or covenant. 5 Johns. R.  
168, Hughes  
v. Miller & al.

§ 14. In an action of covenant where some of the breaches are well assigned, and some not, and the deft. demurs to the whole declaration, the plt. will have judgment for the breaches well assigned. Cro. J. 575. Held, on general demurrer; the covenant was to pay \$102.29, as to which the breach was well assigned, also to pay uncertain sums as to which the plt. could not sue &c. 6 Johns. R.  
168, Adams v.  
Willoughby.

**ART. 4. Breaches ill assigned,oyer, &c.**

§ 1. But if the plt. reply, "he has good and sufficient title," it is bad; for he ought to know his own title, and to shew how it is, or the breach is badly assigned. So it is bad, only to state an apprentice wasted divers goods, without stating what. So it is bad in stating a breach of covenant, not to state in what the want of repairs is. Cro. J. 312,  
Gyll v. Glass.  
—5 Com. D.  
342.—Skin.  
344.

§ 2. In covenant for quiet enjoyment of copperas the breach was, that he could not enjoy it, and held to be ill; for the plt. ought to shew a lawful disturbance; but to shew the exact title of the disturber is not required, though some of the old cases are both ways. Hodgson v. E. I. Company. Cro. El. 914.  
—5 Com. D.  
Pleaser, C  
49.—8 D. &  
E. 278.

§ 3. So a breach assigned not co-extensive with the import and effect of the covenant is bad; and the breach must be assigned to have been before the action brought, because before the breach there is no cause of action. 5 Com. D.  
604—1 Sid.  
307.

§ 4. And if the declaration on the deed be not according to the construction which the words do import, the deft. may demand *oyer* of the deed, and demur. So if the deft. plead no covenants, the plt. may demand *oyer*, and demur. So in debt. on bond to perform covenants, and when the deft. shews the deed. 2 Saund. 366.  
  
  
5 Com. D.  
606.

CH. 120. § 5. So if the deft. shew a part only of the indenture, and  
 Art. 5. plead performance, the plt. may demand that it be enrolled,  
 and then demur. 3 Lev. 305.

2 Saund. 380. § 6. If the several breaches are assigned, some ill and  
 —2 Cro. 567, some well, and the deft. demur generally to the whole declar-  
 Brissey v. ation, the plt. shall have judgment for that part which is good ;  
 Humphreys. for they are as several actions.

5 Com. D. § 7. If the plt. in his declaration omit any covenant, the  
 606.—Bro. deft. to take advantage of this must crave *oyer* ; and before  
 16, 25.—1 *oyer* of the deed in covenant the deft. may plead, or he may  
 Sid. 60, 97, plead after *oyer* as the case may be ; but in debt on bond for  
 425.—1 performing covenants he cannot plead without *oyer* of the  
 Saund. 19. bond, and after *oyer* of the bond and condition, which must be  
 severally craved, the deft. must state the deed mentioned in  
 the condition under the plt's. seal, and if he do not, it will be  
 bad on special demurrer, and if the deft. have not the deed,  
 the court on motion will order the deed, or a copy of it to be  
 delivered to him by the plt.

4 Mass. R. § 8. *Letter of license.* This was an action of covenant  
 433, White v. broken, on a covenant in which the deft. covenanted not to  
 Dingley. sue the plt. for two years for a certain demand expressed ;  
 and if he did sue, the plt. should be discharged of the debt.  
 The deft. sued before the two years expired on said demand,  
 and committed the plt. &c. On *oyer* it appeared to be a let-  
 ter of license in common form by which the several creditors  
 who sealed it gave to the plt. full liberty and license for two  
 years from the date to go freely about his business, and cove-  
 nanted not to sue him &c., and if they should sue him, then  
 the said White shall be wholly discharged against the credi-  
 tor or creditors so suing &c. The deft. pleaded in bar of this  
 action on the covenant, that he did sue said demand against  
 the plt. before said two years were expired, to which said  
 action the now plt. pleaded the said letter of license in bar,  
 and had judgment for costs ; plt. demurred. Judgment, deft's.  
 plea was good, and the court said no action lies for suing a civil  
 action, if not alleged to be malicious and without probable cause.

11 East, 633, In declaring on a complete covenant the plt. must not omit  
 Howell v. any part that qualifies or varies the sense or legal effect of the  
 Richards, part stated, as in such there will be a variance. This and  
 cited 1 Chit. many rules come to this, the party must truly state the con-  
 on Pl. 302. tract he relies on.

ART. 5. *Breach assigned in the replication &c.*

3 Lev. 167, § 1. As in debt on bond for performing articles, after *oyer*,  
 306. and stating them, the deft. pleaded the articles performed  
 generally ; the replication was *precludi non*, protesting the  
 deft. did not perform, and pleaded one S., tenant of the deft.  
 of a close so called ——— did on ——— obstruct the

plt's. way through and beyond said close granted to the plt. by the deft., so that the plt. could not use his said granted way, &c.; the deft. demurred. By the articles the deft. granted a way to the plt. &c. by and through the plt's. close, and the plt. was to repair the gate between his close and the deft's.; and the deft. covenanted that his son when of age should confirm it. The deft. pleaded his son was not of age, and that he performed all the residue as above; held, it was a good grant of the way and a covenant of enjoyment: 2. That the replication was ill in not shewing the tenant had title to stop the way, and if not, it was but a trespass, for which the plt. had his remedy by an action of trespass, but not by covenant against the covenantor.

CH. 120.  
Art. 5.

§ 2. This was debt on bond conditioned to perform articles; the deft. pleaded performance, part in the negative and part in the affirmative; plts. assigned a breach in not paying money into the postoffice &c.; oyer of the bond, condition and instructions; then the deft. says *actio non*, and in substance he had performed all the duties of the office of postmaster &c., and obeyed all the instructions in the said instructions and specified &c., especially as to receiving letters &c. Replication protesting the deft. did not perform said duties and obey the said instructions &c., for plea said, that from — to — the deft. continued postmaster of said stage at —, and received £184. 12s. postage &c., and not paid it to the postmaster in London &c. The deft. demurred, and judgment for him. The point was, the plt. had appointed the deft. deputy postmaster for six months from a certain day, and if he, his deputies, servants, or assigns should, during the time he should continue deputy postmaster of the said stage, perform &c., then the bond to be void. The deft's. objection was, that he was bound for Jenkins only six months, and the plt. would have him bound for Jenkins' life, and his breach assigned was accordingly; whereas it should have been assigned for the non-payment of the money received within said six months. The court was of opinion the breach was badly assigned, as the condition referred only to the recital by which the deft. was bound only for six months, and no more, and not indefinitely as the plt. supposed. The words "*all the time he shall continue deputy postmaster,*" had no verbal reference to the six months, but the reference was seen in the reason and nature of the whole case taken together, as it appeared in the whole instrument.

§ 3. In an action of covenant for rent due on a lease against the assignee of the lessee, the plt. need not aver in his declaration that the lessee had not paid the rent, the breach is well assigned by stating the rent accrued after the assign-

6 Johns. R.  
106, Dubois'  
ex'rs. v. Van-  
orden.

CH. 120. ment to the deft., and that the same was due and owing to the plt. and in arrear &c.

Art. 5.

7 Johns. R.  
461, 462,  
Thomas v.  
Roosa.

§ 4. The plt. declared on a note payable in chattels under the statute; breach assigned the deft. did not pay the money mentioned in the note &c. Held well after verdict, and that the reference to the statute was but surplusage, and that the defect in assigning the breach was aided by verdict, so that the court might well intend a sufficient breach was proved.

8 Johns. R.  
111, 116,  
Smith & al.  
v. Jansen in  
error.—5 Bos.  
& P. 312.—5  
Johns. R. 42.  
—1 Saund.  
58.—2 Saund.  
187.—Doug.  
49.—2 W. Bl.  
1190.—6 D.  
& E. 303.—  
8 D. & E. 388.  
—2 Johns.  
Ca. 204.—5  
Johns. R. 42,  
74.

Debt on a bond given for the goal liberties; held, the suggestion of the breach generally in the words of the condition is sufficient, without alleging the particular damages. Held, the declaration was good on such a bond; the entry on the record was, that judgment on the demurrer should be stayed until the truth of the breach to be suggested should be ascertained and the damages assessed. Held correct within the statute (Sess. 24, c. 90, s. 7.) which is to receive a liberal and beneficial construction, the suggestion of breach may be before a formal entry of judgment on demurrer &c. But where in a final judgment the Court of Common Pleas gave judgment for the debt and six cents costs, with the damages assessed by the jury, and also costs of suit adjudged of increase, this was held erroneous, and the judgment of the court below was reversed as to the sum assessed for damages; but suffered to stand good as to the debt and costs, including the costs of assessment, and neither party was entitled to costs on the writ of error. 8 D. & E. 253; 4 Johns. R. 214; 3 Bos. & P. 607; Stra. 188.

2 Johns. R.  
413, 416,  
Post Master  
Gen. of the  
United States  
v. Cochran.  
—Cro. El.  
253, 394.—  
Cowp. 47.

§ 5. The plt. declared on a bond conditioned to perform covenants, and assigned the breach in the first instance, as he might do, in his declaration. Held, the deft. could not plead a performance generally, but must particularly answer the breaches assigned, and shew when, how, and where he performed his covenants. 1 Burr. 316; 2 D. & E. 439; 3 Caines' 162; 2 Do. 320; 2 Burr. 772.

1 H. Bl. 34,  
676, Noble v.  
King & al.—  
Thayer v.  
Wendel, 1  
Gallison, 37.

§ 6. The testator had a lease, and his executors, the two defts., assigned it by way of mortgage, and covenanted for a good title and quiet enjoyment against all person or persons whatever. In an action against them on this covenant in their own right, held, the declaration must shew a breach by some act of the covenantors. And the court would not assist the plt. in his action against the defts. in their own right, "who appeared only to have acted in the disposition of the testator's effects."

4 Johns. R.  
213.—2  
Caines' R.  
329.

§ 7. In actions on bonds for the performance of covenants the plt. must assign breaches; and for them the jury must assess damages, and if they do not, it is error; not enough to assess damages for the detention of the debt and costs; and

when such error exists a *venire de novo* must be awarded, as **CH. 120.**  
 2 Wils. 377, *Drage v. Brand*; 5 D. & E. 636, *Hardy v. Art. 6.*  
*Bern.*

§ 8. A breach is well assigned that negatives a covenant in its true meaning. As where A sued B on his covenants, and stated that B by deed &c. sold to A a certain slave, and covenanted to warrant and forever defend the sale of said slave to A, against all persons lawfully claiming any estate, right, or title to the slave &c., and A averred that the person so sold as a slave was not a slave, but free at the time of the sale. On demurrer to the declaration held, the breach was well assigned, and that covenants are to be construed according to the spirit and intent. There is to this rule the common exception; that is, the breach assigned and issue offered must not include a multiplicity of matter.

6 Johns. R.  
 49, *Quackenboss v. Lansing.*

**ART. 6. Several cases.**

4 Hen. & Mun. 82, 90, *Buster's exr. v. Wallace*. Wallace sued Buster's testator on a covenant respecting land made by his attorney, selling five hundred acres of land on Silver Creek, in Kentucky. Held, 1. It is sufficient the declaration state the substance of the covenant and legal effect only of such parts of deed as are necessary to entitle the plt. to recover: 2. In assigning a breach it is enough to state so much as to shew the intention of the parties: 3. Where the plt. charged a covenant by the deft. to sell the plt. five hundred acres of land, &c. and to refund all monies paid for it, if the land, or any part of it, were lost, held sufficient to assign a breach, that the "deft. had no land at all in the place specified:" 4. A breach badly assigned is aided by verdict for the plt., on issue joined on the plea, the deft. had not broken his covenant: 5. The tract had no boundaries stated, but a particular tract was shewn the purchaser as the land agreed to be sold; parol evidence is admissible to shew the seller had no land there at all, or not the tract he shewed.

Sixth. By Kentucky act, December 19, 1796, s. 6, in actions on bonds or penalties, for not performing covenants &c. in indentures, deed, or writing, the plt. may assign as many breaches as he pleases, and damages are assessed for those proved to be broken, the same where judgment on demurrer, or by confession, or *nil dicit*, is given for the plt. Judgment is entered for the penalty of a bond, but is discharged by paying principal, interest, and costs; and if principal and interest of any debt be paid before action brought, the deft. may plead it in bar.

Seventh. In debt on a bond for the performance of covenants, a breach need not be assigned, where a special issue

CH. 121. requires a special replication. Yelv. 25, 26, 78. And the Art. 1. plt. is not held to shew an act done between the deft. and a stranger, to which act the plt. is no party.

## CHAPTER CXXI.

### PLEADINGS IN COVENANT BY DEFENDANTS.

#### ART. 1. *General principles.*

§ 1. In this action of covenant, grounded on a deed, a *profert* thereof must be made, or an allegation that it is lost by time and accident, must be made, the fact being so. In this action the plt. may often assign a breach of the contract generally, in the words of it, and thereby put the deft. to give an answer; and he, in many cases, may plead performance generally, and thereby put the plt. in his replication more particularly to assign a breach of the deft's. covenant. In covenant, especially, it is often necessary to pursue the pleadings in several stages of them, to have a full view of the plt's. demand, and the grounds of his action. In other actions we generally see the grounds of the plt's. action in his declaration alone; as in *assumpsit*, the plt., in the first instance, states, in his declaration, the deft's. promise, and such a breach of it as gives the plt. his whole ground of action; so in debt he states the deft's. contract, and such a breach of it as gives the plt. a complete cause of action. But in covenant it is frequently necessary for the plt. to complete, as it were, his declaration by his replication, and this is owing to the peculiar nature of the deft's. plea in covenant, and to the circumstance of a penalty to enforce the covenants. As where the deft. covenanted he was seized in fee; the plt., in his declaration, only alleged that he was not seized in fee; then the deft., in his plea, alleged he was seized in fee, and shewed what estate he had, at the time of the conveyance, &c.; now the plt., in his replication had more to do to support his action, and to shew its grounds, that is, to shew a special title in some third person. So when the penalty is sued for, the plt. brings his action of debt, as on a bond, the covenants, the real ground work, do not appear in the declaration, but appear on the deft's. craving  
 12 Mod. 407. oyer; when the covenants thus appear, the deft. answers to

Andrews v.  
Paradise,  
8 Mod. 318.

them ; and then the plt., in his replication, first notices them. Hence if there be an ill plea, and the replication assign an ill breach, the plt. cannot have judgment ; because as the plt's. declaration but imperfectly states a title, he in that shews no ground whereon to have judgment, though the deft. plead an ill plea. Otherwise if the plt. state a complete title in his declaration, or grounds sufficient whereon to recover, he must have judgment, if the deft. plead an ill plea, though the plt. make a bad replication.

CH. 121.  
Art. 2.



ART. 2. *Pleas good.*

§ 1. *Pleas of performance generally.* If all the covenants are in the affirmative in an indenture, the deft. may plead performance generally, as that "he hath kept and performed each and all the covenants set forth in the plt's. declaration aforesaid ;" and when this is not true, but the deft hath broken them himself, or himself hath failed to perform them, the plt. may reply in the same words nearly, "that the deft. hath not kept and performed each and all the covenants set forth in the plt's. declaration aforesaid, as the deft. hath in his pleading alleged, and this the plt. prays may be inquired of by the country."

Cro. El. 691.  
3 Ins. Cl. 462.  
—2 Saund.  
411.—4 Inst.  
Cl. 15, 19, 50,  
60.—5 Com.  
D. 99, 608 —  
Cro. El. 749.  
—3 Inst. Cl.  
461.

§ 2. But if any of the covenants to be performed, by the deft., are in the negative, he must plead to those specially, as a negative cannot be performed, and to the others generally. So hath not broken his covenant, is a general plea, when the declaration is "and so the deft. hath broken his covenant."

Co. Lit. 303.  
—1 Esp. 372.  
—3 Inst. Cl.  
461.—2 Mod.  
311.—8 D. &  
E. 280.—  
Hob. 13.

These rules are laid down, first when there are in the indentures covenants in the negative for non-feasance, and in the affirmative for feasance, there the deft. is to plead specially to the negatives that he hath not broken them, and to the affirmatives that he hath performed them : 2. When the negatives are against law, and the affirmatives lawful, there he may plead performance generally ; and the court will take notice that the negative ones are against law and void.

Cro. Jam.  
165, 340, 365,  
503, 669.—  
Moore, 850.  
—4 Bac. Abr.  
87.—1 Bac.  
648.—3 Inst.  
Cl. 513.—5  
Com. D. 397,  
399, 609.

§ 3. When some covenants are void by the common law, and others not void, the obligation stands good for those that are valid, but not for the others ; and if to affirmative covenants, negative words be added, of the same import, it makes no difference.

5 Com. D.  
399, 609.

The following case is of affirmative and negative covenants. The deft. covenanted in the charter-party, that he would sail from A to B, and the words were that he would *depart, proceed*, and *not deviate*. In covenant brought he pleaded performance generally ; and the court held, his plea was bad, for there was an express negative covenant, "that he should not deviate, to which he should have pleaded specially ; for though he sailed from A to B yet he might have deviated ; and the case is the

1 Esp. 372,  
Laughwell v.  
Palmer.

CH. 121. same in debt on bond for the performance of covenants.  
 Art. 2. Performance generally is a bad plea :—and plea in the negative needs less certainty. 5 Com. D. 386, 398.

Co. Lit. 303.  
 —1 Esp. 373.

Goodwin v.  
 Draper, 3  
 Bac. 248.

2 Salk. 573,  
 575.

4 Bac. Abr.  
 551.

1 Lev. 152,  
 Johnson v.  
 Carre.

Dougl. 690.  
 —2 Bl 1312.  
 —5 Com. D.  
 606.  
 1 Esp. 375 —  
 2 Co. 28.—6  
 Com. D. 607.  
 —2 W. Bl.  
 1152, Friend  
 v. Eastabrook.

1 Mor. E.  
 303, 304, 307.

§ 4. So if the covenants are in the disjunctive, the deft. must shew which of them he has performed. So where the covenant is for the act of a third person, performance generally is a bad plea ; the plea ought to shew how performed. Cro. El. 232, 560. As if A covenant that B shall levy a fine. 1 Lutw. 581 ; 1 Saund. 117.

§ 5. *Where one covenant may be pleaded in bar of another or not.* A covenant in one indenture shall not be pleaded in bar of a covenant in another indenture, except such be a defeasance of the former ; for perhaps the injuries may not be equal ; and to make one a defeasance to the other, it must appear the one is intended to operate as a defeasance, and it must contain proper words for that purpose, as reciting the first deed and declaring it to be thereby void.

But one covenant in a deed may be pleaded as a bar of another covenant in the same deed ; for the sense of the parties is to be collected from the whole deed. As in covenant for rent, the deft. was allowed to plead another covenant in the same indenture, that he, as lessee, might retain so much of the rent for repairs and charges.

But if the covenants be mutual, the deft. cannot plead in bar, that the plt. has not performed ; for then the deft. has another remedy founded on the covenant to him.

§ 6. *Non est factum* is a good plea in this action, and under this plea the deft. may shew that some of the covenants have been altered or erased, or he may plead it ; for if any covenant be altered or erased, the whole deed is discharged. But where the deft. pleads *non est factum*, he cannot controvert the lessor's title, for the issue is only on the execution, or goodness of the deed ; the sole question is, *if it be his deed* at the time of the plea ; and where the signing, sealing, or delivery of the deed, is disputed, the plea is *non est factum*. If there be *duress* in the case, *non est factum* ought not to be pleaded ; for it is his deed though rendered voidable by special matter, when specially pleaded and shewn to the court, who ought to judge if the deed be avoided by this matter in law. So if the deed be voidable by statute, as by 23 H. VI., as to sheriff's bonds, or by the statutes of usury, *non est factum* is not the proper plea, but the matter must be specially pleaded and shewn to the court to judge of ; for where a statute declares a deed to be void, it is not *ipso facto* made void, but only voidable by pleading ; and to plead *non est factum* is to refer the matter to the jury, no judges of the law,—hence no judges if in law a statute does avoid a deed. And where the

deed is only voidable, the plea concludes to the court, if the plt. ought to have his action. CH. 121.  
Art. 2.

But if the dispute relate to the signing, sealing, or delivery, this is matter of fact, proper for the party's consideration ; so *non est factum* is proper. Antiently however, when the deed was signed, sealed, and delivered, but was originally void, by matter *dehors*, as by reason of *coverture*, or because the party had no right in the thing transferred by the deed, or became void afterwards by rasure, interlineation, or addition, there the deft. must have pleaded the matter specially, and concluded so *non est factum*, in order to apprise the plt. of the point of defence ; for as various ways existed of making the deed void, and any of them might be in evidence of the plea of *non est factum*, it was thought the plt. could not come prepared to falsify the deft's. evidence, hence notice was required to be given in season of matters *dehors* to be given in evidence ; this conclusion to the court also on a special *non est factum*, was thought to contain matter of law proper for the court, but the practice is now otherwise.

If the deft. plead the deed was delivered as an *escrow*, and conclude specially, so not his deed, the general practice is to leave it to the jury, because it is in effect to say there was no deed at all ; but it may be left to the court, by a *hoc paratus est verificare*, as the court will judge if the deft. has shewn such matter as avoids the deed.

But if the deft. plead breaking of the seal, rasing, or any addition after delivery, he may conclude, and so *non est factum*. But the better pleading has been deemed to be to conclude *si actio* to the court ; for the deed once having been in force, and avoided by after matter, it is in fact a question of law proper to be referred to the judges, if such matter does, by law, avoid the deed or not. It is true such matter proves the deed not the deft's. at the time of the plea ; but whether made void by law or not, is often a question of law, in its nature, more than a question of fact ; as if a stranger erase a superfluous word in a deed, the fact of rasure is admitted, and the real question is, if this rasure does, by law, avoid the deed ; so in its nature is a question of law. But if the deft. give the deed to another, and not to the plt., the deft. ought to plead *non est factum* ; for the deed declared on from the deft. to the plt. is not the deft's. deed ; he made no such deed. And if the deft. confess a deed, and plead a release of it, he must not conclude *non est factum*, but judgment *si actio* ; for it was his deed, and is his deed, though avoided by another contract ; and this ought to be shewn to the court to judge of, and that the court may judge of its validity and effect to avoid the other contract. The deft. made his deed to one A and

CH. 121. another, A sued it; *non est factum* is not the proper plea, but  
 Art. 2. the special matter; for if it were his deed, executed by him  
 to another person, it was his deed though not to the plt., and  
 this seems to be the best authority. But if a wrong party be  
 sued who bears the obligor's name, he may plead *non est  
 factum*, for this deft. has made no deed. The deft. cannot  
 plead *non est factum* and demur on the same deed, for this is  
 double. See sundry forms and matters in covenant, which  
 may be of some little use.

Bohun, 244,  
 251.

1 Esp. 378,  
 Carter v.  
 Downish.—  
 2 Brownl.  
 273, Hare v.  
 Savil.—  
 3 Ins. Cl.  
 472.—  
 5 Went. 85.—  
 See Ch. 170,  
 a. 1.

§ 7. Tender and refusal is another plea in this action, but  
 as damages only are recovered in it, it need not be pleaded  
 with *uncore prist*; for *uncore prist* is necessary only where  
 there is a debt that still remains due notwithstanding the ten-  
 der. So in this action of covenant, nothing in arrear, or pay-  
 ment at the day is a good plea; and where a thing is to be  
 done on request or a certain day, tender and refusal and  
 always ready from the request or day, is sufficient. But this  
 must be understood of cases in which the deft. can calculate  
 and tender the true sum, not when the damages to be recov-  
 ered are a matter merely in the discretion of the jury.

1 Esp. 376,  
 376.—Godb.  
 69, Barker v.  
 Fletwell.—  
 Cro. El. 374,  
 Carrel v.  
 Read.—  
 3 Inst. Cl.  
 481.—4 Ins.  
 Cl. 99.—  
 Yelv. 22, 33.  
 —3 D. & E.  
 442.—Hob.  
 190, 326.—  
 Yelv. 18, 19,  
 139. Evic-  
 tion of the  
 lessee dis-  
 charges all  
 rents, bonds,  
 and cove-  
 nants.

§ 8. Entry and eviction is a plea in this action, but it must  
 be pleaded to be such as disabled the deft. from performing  
 his covenants. He must state he was prevented by the lessor  
 to enjoy the estate, "for if the covenant could be performed,  
 an entry shall not excuse a non-performance. The lessor's  
 entry into the back yard will not defeat the lessee's covenants  
 to repair; but will suspend the rent. This plea must actually  
 shew the lessee was kept out and expelled; and in Haynes v.  
 Maltby, Buller J., the court "in the construction of all cove-  
 nants and agreements," have universally considered the inten-  
 tions of the parties; here the plts'. assertion they had an ex-  
 clusive right to the machine they permitted the deft. to use,  
 was the consideration of his covenant to use it in a certain  
 manner &c.; but as it appears they had no such right, the  
 consideration on his part failed. The facts in this case are  
 equivalent to eviction of the tenant. "As long as the tenant  
 holds under the lease he is estopped from denying the land-  
 lord's title; but when he is evicted, he has a right to shew  
 that he does not enjoy that which was the consideration for  
 his covenant to pay the rent, notwithstanding he has bound  
 himself by the covenant."

Cowp. 242,  
 Hunt v.  
 Cope.

And it is a rule in pleading, that eviction must always be  
 pleaded in an action of covenant, (though otherwise in debt,  
 Bull. N. P, 177;) but to suspend the rent there must be an  
 eviction or expulsion of the lessee, and if the plea states a  
 mere trespass it shews no eviction. The facts the plea stated  
 were, that the landlord forcibly and unlawfully entered upon

the garden, part, &c. and pulled down the roof and ceiling of a summer-house, part of the demised premises &c. by which the lessee had been deprived of the use of said summer-house from April 1, 1770, to the day of taking the goods. But Lord Mansfield said, the lessee "should have pleaded eviction, and then the facts now stated might have been sufficient for the jury to have found a verdict in his favour." *Ld. Raym.* 77; *T. Jones*, 148; *Bull. N. P.* 165.

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§ 9. Infancy is another good plea in covenant; for an infant cannot bind himself, except for necessities. Therefore, in an action of covenant against an apprentice on an indenture of apprenticeship it was adjudged not to lie against the deft., he being an infant. But in debt for rent the deft. pleaded infancy at the time the lease was made, and on demurrer the court held the lease voidable only at the minor's election, by waiving the land before the rent-day came, but the deft. not having done this, and being of age before the day came, the plt. had judgment. This case which is clear law, proves that a minor's deed as to lands is not void, but only voidable, and therefore, if when of age he does any act to confirm it, the same is made valid, as in this case by remaining in possession after of age.

1 Esp. 379—  
Cro. Car. 179.

*Bull. N. P.*  
177.—Cro.  
Jam. 320.

§ 10. *Accord and satisfaction &c.* is also a good plea, as stated in a former article, and as stated in *Marquand v. Hale*, in Debt; plea, accord and satisfaction &c. So a release is a good plea, but a release of all actions before the covenant is broken does not discharge the covenant, nor does such a release of all actions, suits, and quarrels, nor a release of all demands; but a release of all covenants will, for on making the release there is a covenant, but no action, suit, quarrel, or demand. 3 *Ins. Cl.* 464, 193, 194; 2 *Inst. Cl.* 669; and 1 *D. & E.* 141, *Rex v. Harberton*. Lord Mansfield said, that after paying money on an indentures of apprenticeship if an action be brought by the master on them, the pauper may plead accord and satisfaction in bar. Accord to pay a sum certain and other things is a good plea; but is bad when pleaded in satisfaction of a covenant before it is broken: and see the form of the plea, post; and in *Rex v. Harberton* the covenant was not broken when discharged by receipt. See *Ch.* 121, a. 3, s. 14, 15.

1 Esp. 376,  
377.—3 *Ins.*  
Cl. 509.—Co.  
Lit. 292.—  
Allen, 38,  
Euler v.  
Lambert.—  
Cro. Jam.  
487, Field v.  
Hancock —  
4 *Ins. Cl.* 92.

3 *Inst. Cl.*  
570.—4 *Inst.*  
Cl. 92

§ 11. So payment is a good plea in this action of covenant, made either to the plt. or to another at his request and by his direction. And so in an action of covenant to pay rent, it is a good plea, that he left monies in the plt's. hands to pay it. The only question is when the deed is to pay a certain sum, due in virtue of the deed alone, what shall be evidence of its discharge. See *Discharge and Evidence*.

3 *Inst. Cl.*  
494.—4 *Inst.*  
Cl. 94 to 101.  
5 *Went.* 91.  
—4 *Mod.* 249.

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1 Saund. 45.  
—5 Com. D.  
Pleaser E. 6  
—3 Inst. Cl.  
492, cited 1  
Saund. 45,  
49.

3 Inst. Cl.  
470.—Bro.  
Red. 143.

3 Inst. Cl.  
470.

4 Bur. 1980,  
Wilson v.  
Sewell.  
Co. Lit. 338.  
—Hutton,  
104, Watt v.  
Maydewell,  
Lloyd v. Gre-  
gory.

5 Co. 11, 12,  
Ives' case.—  
Cro. El. 521,  
522.

5 Went. 84.—

4 Inst. Cl.  
103, 104.

3 Inst. Cl.

460, 461, 520,  
521.—2 Sel.  
458.—Ch.

123, a. 3, s. 5.

8 D & E 278,  
283, Hodgson  
v. E. I. Com-  
pany.

§ 12. In covenant for rent, retainer for repairs &c. is a good plea, where the lessee has power to retain, as above stated. But retainer for necessary charges, without specifying what, is too general and uncertain. So it is a good plea, he laid out the rent in necessary repairs. Form of the plea;—but it is conceived there must be some terms in the contract between the parties expressed or implied, to justify the tenant in applying the owner's rent to repairs.

§ 13. The deft. pleaded he leased another house to the plt. in full satisfaction of the damages he sustained by the said breach of covenants &c.

§ 14. To an action of covenant by the lessee a surrender is another good plea, and a new lease accepted by the lessee, or a surrender only. But it has often been a question what is a surrender. On this point it has been resolved, that the acceptance of a new lease of twenty-one years in 1762, was an implied surrender of an old lease, dated in 1755, for twenty-one years, though an actual surrender was written the day before the new lease, and actually executed in 1764. But if the lease of 1762 had not been a good one, then the acceptance of it would not have been an implied surrender of the lease of 1755, because only a valid instrument could have that effect. Sir W. Jones, 405, 406.

So it is a surrender if the new lease is to begin at a future day or on condition; for the lessee by accepting the new lease affirms the lessor's ability to make it; this ability he has not if the first lease stands. Therefore, if lessee for twenty years take a lease for three years to begin ten years after, it is a present surrender of the whole term. Same case is at large, Cro. El. 521.

A surrender in fact, though not in words, must be pleaded as a surrender. Form of the pleas.

§ 15. So, he hath not broken his covenant, is a good plea, where the plt's. declaration concludes, and so the deft. has broken his said covenant, and on a single point.

Many questions have been made as to this plea, *non infregit conventionem*: 1. On the ground it does not make a proper and formal issue: 2. That it puts too many matters in issue in one issue. As in this case of an action of covenant on the deft's. covenant of quiet enjoyment of a large tract of country, without disturbance from the defts. or any other person lawfully claiming or to claim under them. Declaration assigned seven or more breaches of this general covenant; one, that W. Tolly had lawful claim &c. to part, and entered and got possession: another, (seventh breach,) that one Gocoul Gosacok and others had legal claims to parts, entered, &c., expelled &c. To these various breaches defts. pleaded several

pleas on which issues were joined ; also two other pleas ; one they did not break their covenants [in the plural] specified in the declaration &c., another to the seventh breach notice &c. To this *non infregit* &c. plt. demurred specially : 1st cause, "The plea is too large and general, and attempts to put into one issue all the several matters alleged by the plt. in the several breaches of covenant : " 2. "Is a negative pleaded by way of answer to a negative, and attempts to make an issue out of two negatives, inasmuch as the plt. hath alleged that the defts. had not kept their covenants," [in the plural] "and the defts. by way of answer to that allegation have pleaded that they have not broken the same" &c. As to this second objection the informal issue, the court held it argumentative and bad, and it was clearly so : but as to the first, several matters in one issue, the court said nothing ; plt's. counsel said it put the execution of the deed in issue.

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This case the plt. cited to support his demurrer. In this the same two objections were made to the plea *non infregit* &c. in covenant on a lease for not repairing the leased premises ; plt. assigned several breaches. Plea, *non infregit conventionem*. Plt. demurred : 1. That the plea is too general ; for several breaches were assigned : 2. Breach being in not repairing, *non infregit* &c. made a bad issue because two negatives. Judgment for the plt. on these grounds. But Selwyn does not state the number or kind of breaches.

3 Lev. 19,  
Pitt v. Rus-  
sel, cited 2  
Selw. 458,  
459—Sto-  
ry's Plead-  
ings, 151.—  
5 Com. D.  
2 V. 5, Plea-  
der.

In this case the objection was only to the two negatives, breach not paying an annuity. Plea, *non infregit* &c. No doubt this plea was informal and offered an informal issue, and bad on special demurrer. *Walsingham v. Coombe* ; two negatives,—breach, not performed his covenant to convey ; plea *non infregit*, so informal, but held well after verdict ; also objected it was too general, for the plea ought to answer particularly in covenant to the breach assigned ; but here again the court took no notice of the plea's being too general.

2 W. Bl.  
1312, Boone  
v. Eyre.

4 Bac. Abr.  
60, cites Lev.  
193,—Sid.  
289.—2 Keb.  
10, 13, 47.

The plea is general, *non infregit conventionem prædictam modo et forma prout &c.*, and *de hoc ponit se super patriam &c.*, and plt. *similiter*.

3 Inst. Cl.  
461, 520, 521.

Breach, deft. was not seized in fee, and so broke his covenant ; deft. pleaded he did not break it. Replication, he did break it ; held, only an informal issue,—should have been, not seized in fee. Cites 2 Keb. 10, 13, 47, 51. Covenant to pay £36 when raised, *non infregit* &c. ill on demurrer.

So a general performance is good on a general demurrer, though some of the covenants be in the affirmative and some in the negative ; aliter if in the disjunctive. So the deft's. plea of general performance is aided by a replication, that he has not performed ; for if performed or not is the substance,

Cro. El. 232,  
Hyde's case.  
—5 Com. D.  
397, 606.—  
Yelv. 87.

CH. 121. and want of form cannot be taken advantage of on general demurrer.  
Art. 2.

But in some cases the deft. must plead performance, and shew how specially, and if he do not so plead, the plt's. replication, that he has not performed, will not cure the defect : as if the covenants are in the disjunctive, the deft. by his plea must shew which he has performed. So if a condition be to pay at four days, he must plead and shew how performed, and if he do not, it will be bad on general demurrer, for the court cannot know what part is performed. So if the condition of a bond requires several things to be done, it is not enough for the deft. to plead he has performed all things to be performed on his part, though all are in the affirmative; but he ought to answer particularly to every part mentioned in the condition. So if an act required to be done by a stranger in a covenant; as if B covenant that A and his wife shall levy a fine, it must be specially shewn they did it, and the manner. So if a covenant shew an act on record, the deft. ought specially to shew it done.

§ 16. So special performance is a good plea : as that the deft. for the said ten weeks did provide for said six horses good and sufficient hay &c., according to the form and effect of the said indenture, to wit, at ———; and issue. And it is farther to be observed that the plea of performance in the affirmative must be general or particular, as the case is. Here deft. concluded to the country; but often this plea of performance, *hoc paratus*. 3 Inst. Cl. 461, 482.

§ 17. So in covenant, on an indenture of apprenticeship, it is a good plea for the apprentice to plead, "he offered himself to serve the plt., his master, during the term of years in the said indenture specified, according to the form and effect thereof; and that the said plt. refused to receive the said deft. into his service;" with a *traverse*, he refused to serve, &c. So the master may plead that he performed to such a time, and then the apprentice left him.

§ 18. So if the deft. covenant to deliver thirty quarters of fruit to the plt., it is a good plea for the deft. that at ———, on ———, he gave notice to him he would deliver it at such a place and time, according to the contract, and he refused to receive it. In this case the deft. added, he was always ready, and still is ready to deliver it. But *quære* of this last part of the plea. And see tender of bulky articles; and 3 Inst. Cl. 144, 145.

§ 19. So a plea is good, answering and taking issue on each particular, being a distinct thing. As in covenant for not repairing the premises : the first plea may answer to the timbers : 2. As to the glass windows : 3. As to the plastering

5 Com. D.  
397.—Co.  
1. it. 303.—  
10 H VII. 12.  
—2 Cro. 560.  
—1 Leon.  
311.—Cro.  
El. 232.—  
5 Com. D.  
398.—2 Cro.  
559, 560.—  
1 Lev. 303.—  
2 Roll. 159.—  
Co. Lit. 303.

3 Inst. Cl.  
462.—Per-  
formance is  
in substance,  
not in letter,  
Yelv. 87.—3  
Inst. Cl. 464.

Pleader's Ass.  
320.—Went.  
416.

3 Inst. Cl.  
472.—Ras.  
Ent. 134.

3 Inst. Cl.  
477, 478, 479.  
—Co. Lit.  
304.

&c. So the deft. may plead one matter to one part, and another in bar to another part; and though one of the matters pleaded goes to the whole, it is not double pleading. CH. 121.  
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So various pleas in covenant in the same action on charter-party, &c.; and there are many cases in which distinct issues in the same action are taken on distinct matters, and it would be a great fault in pleading to confound many of such matters in one plea and issue. 3 Inst. Cl.  
607, 608.—3  
Wentw. 347,  
364, 375.—  
Salk. 138.

Debt was brought for rent of four rooms, on a parol lease; bar as to £4. 10s. *nil debet*, and issue, as to the residue that the plt. let five rooms, and entered into the fifth and ejected the deft from it, *hoc paratus*; and the plt. demurred. Judgment for the plt.; for the deft. should have pleaded a lease of the five rooms, and traversed the lease of four; for the plt. could not join issue on the expulsion without a departure &c. 4 Inst. Cl.  
172 to 177.

So in the same action, *non demisit* to part was pleaded, and demurrer to that part; distinct parts of the estate said to be demised. 4 Inst. Cl.  
181, 182.

So if several breaches in covenant be assigned, the deft. may demur to one, and plead to the others; and the want of a good breach is bad, on a general demurrer; but otherwise if a breach be not well assigned. 1 Saund. 108.  
—5 Com. D.  
605, 609.

§ 20. So it is a good plea if the deft. plead, that he performed all the covenants on his part to be performed, to such a day, *hoc paratus*, and further that on ——— one J having a prior and better title to the premises, let them to one W, &c. by virtue of which the said W, on ———, entered into the premises and ejected and expelled the said deft., and yet holds him out, *hoc paratus*. 3 Inst. Cl.  
482, 483, 484.

So if all the covenants be in the negative, the deft. may plead generally in the negative. 5 Com. D.  
609, 610.

So in covenant for rent, the plea may confess a part of it due, and as to the residue, he assigned over before it became due. *Quære* as to covenant. 3 Inst. Cl.  
256, 257, 259.

§ 21. So if the departure of the plt's. ship with all due speed, or his rendering an account of a voyage, be a condition precedent, to the deft's. accounting &c., he may plead the ship did not depart with due speed, or that the plt. has not rendered his account &c. See the forms of the pleas, and also conditions precedent. 3 Inst. Cl.  
507, 508.

§ 22. So where the deft. is not estopped to plead so, he may plead the plt. had nothing in the tenements; or that he did not demise; or that he did not grant the annuity; as to part of the rent, not in arrear, and as to part levied by distress; that the plt. evicted or expelled the deft.; that nothing passed by the lease, &c. See the forms of the pleas in these cases. But if the deft. plead any of these matters, as he may 4 Inst. Cl.  
89 to 107.—  
1 Saund. 108.  
—Co. Lit. 47.

CR. 121. if not estopped by indenture, and the lease appears by the declaration to be by indenture, the plt. may demur, for the estoppel appears on the record, or he may reply it; but if it do not so appear in the declaration, the plt. must reply that the lease was made by indenture, and pray judgment, "if the deft. shall be admitted to plead the plea against his own acceptance of the lease by indenture," and rely on the estoppel; this he waives if he reply, he had a good estate &c.

6 D. & E. 62, Wilkins v. Wingate.—4 Inst. Cl. 107. If the lessor and lessee both sign and seal the deed, it may be an estoppel. Stra. 817; form of the plea, *nil habuit in tenementis*, 3 Inst. Cl. 494; 4 Inst. Cl. 95, of *non demisit idem*. So nothing in the tenements passed to the deft. by the lease, is another good plea.

3 Inst. Cl. 495.—5 Com. D. 611.—Lutw. 236.—Willes, 150. 7 Mod. 291. § 23. So to covenant for further assurance, on request, it is a good plea, that the plt. did not request the deft. to seal, and as his deed to deliver &c; for the deft. is not to execute the deed till requested by the plt., and then it is a sufficient excuse or plea for the deft., to say he has not been requested to do it. Bul. N. P. 177.

Willes, 150, 162, Danby v. Gregg. So where the deft. is requested to make further assurance, but if the deed tendered to him to be executed by him, contain other lands than it ought to do, it is a good plea that the deed, or note of the fine tendered, as the case may be, comprises other lands than those contained in the deft.'s covenant, which extended only to lands in Ilton, but the fine also included lands in the parish of Marsham, where the deft. averred he had other lands.

3 Lev. 134. § 24. Assignment is another good plea, in certain cases, as by the lessor before the rent become due.

Dougl. 454, 462, Eaton v. Jacques. So one sued in covenant, as assignee, may plead the estate was not assigned to him; and the mortgagee of a term is not assignee, to be sued as such, till he has taken actual possession.

6 Wentw. 75. And it is a settled principle, that the assignee is liable no longer than he holds the estate. To this point many cases apply, especially Walker v. Reeves, Griscot v. Green, Pitcher v. Toovy, &c. So the privity of contract continues between the parties to it, the assignment notwithstanding. The executors of a party deceased are liable on express covenants, though they assign before the rent become due, his covenants pass to, and are binding on, them as contracts; but it is otherwise if they be charged as assignees, for then, like other assignees, they are liable no longer than they hold the land.

3 Inst. Cl. 512.

5 Com. D. 607.

§ 25. So a former recovery is a good plea for the same breach of covenant; form of the plea, 5 Wentw. 89; and in a breach for not repairing, the deft. may plead he did repair,

5 Com. D. 611 ; and if he do not, in his plea, shew how, yet it is sufficient after verdict, 2 Mod. 176. CH. 121  
Art. 2.

§ 26. So an award is a good plea in this action of covenant, as well as accord and satisfaction, after a breach of the covenant.

§ 27. But levied by distress is not a good plea in this action, for it confesses the rent was due. But is it not payment? 2 Selw. 454.

§ 28. In an action against the assignee of a term, the plea of an assignment over ought to shew it was made after the assignment stated in the declaration, but if not no objection can be made against it, after a replication, that such assignment over was fraudulent. It is not necessary that notice be given to the reversioner of an assignment over.

§ 29. *Performance pleaded*, ante, s. 15, 16. Plea, performed all his covenants; and the said D, by J, his attorney, comes and defends &c., when &c., and says *actio non*, because he says that he has fully kept and performed each and all the covenants set forth in the pli's. said declaration, *hoc paratus*.

Replication, and the said P, by L, his attorney, says *precludi non*; because he says the said D hath not kept and performed each and all the covenants set forth in the declaration aforesaid, as the said D hath in pleading alleged, and this he prays may be inquired of by the country.

This plea of performance generally, is allowable only where all the covenants are in the affirmative and comprehend a multiplicity of matters, general in their nature ; as to account for all monies received, to return all writs &c., and where to plead performance of each particular matter would make the plea very prolix, and sometimes all the particulars are not within the deft's. knowledge to plead ; but if there be any thing specific in the matter, though several acts are to be done, they must be specified, and each must be pleaded to be performed ; as in the case above, of a covenant to pay several legacies, the deft. must enumerate each, and plead he has paid it. So if the deft. covenant to convey several pieces of land at several times, so by several acts and deeds, he must specify each and plead a proper conveyance of it ; and one reason is, he has all the facts within his knowledge. In illustration of the multiplicity of matters, see *Merits v. Bethel*, Ch. 121, a. 4, s. 14, and also 15 & 16.

Also this case debt on bond, and deft. prays *oyer* of the bond and condition ; by this it appeared the plt. had appointed one Jenkins deputy postmaster for six months ; deft., his surety ;— condition faithfully to perform all his duties, make all payments, &c. &c. specified in his instructions, annexed to the bond, and keep all other orders, &c. &c. then the bond to be

2 Saund. 404,  
416, Ld. Ar-  
lington v.  
Merrick.

CH. 121. void; also the deft. prayed oyer of said instructions, which  
 Art. 3. were, to keep horses, &c. &c. Plea, general performance of  
 ~~~~~ duties of his office &c.; also pleaded some matters specially,  
hoc paratus. Replication, protesting he did not perform the
 duties of his office, or the orders &c. Plea, assigned a
 breach that Jenkins received the postage of letters, £184.
 12s. which he had not paid, *hoc paratus*. This replication
 was general and correct. Also 1 D. & E. 753 J, Anson v. Stu-
 art; Ch. 63, a. 7; Ch. 121, a. 4, s. 18; also Cornwallis v.
 Savory, Ch. 121, a. 4, s. 19; also Barton v. Webb; and 5
 Com. D. Pleader C. 25, 26, 2 V. 13, 2 W. 33; 1 Lev.
 303; 1 Bul. 43; 1 Sid. 215; Co. L. 303; Sty. 163.

8 D. & E. 458,
 Ludwell v.
 Newman.

§ 30. In covenant for quiet enjoyment, the plt. stated that
 before the demise to him the deft. made a lease to A, which
 was subsisting; that to get possession the plt. sued ejectment,
 but was nonsuit on account of that prior demise, and that he
 had never been in possession. The deft. pleaded, that for
 the first half year of the plt's. term he might have enjoy-
 ed &c., but for non-payment of rent for twenty-one days
 after that half year the deft. had a right to re-enter by a pro-
 viso in the lease, and did re-enter &c. Plea bad, as being no
 answer to the plt's. demand.

ART. 3. *Pleas not good.*

1 Lev. 16.

§ 1. Generally if a plea in covenant as in other actions does
 not answer the whole declaration, it is bad. As if the deft. cove-
 nant to provide 200 men, and pay £5 for each, and the plt.
 assigns a breach in both points, and the deft. pleads as to the
 providing only, and not as to the paying, it is bad. So many
 other general rules apply in covenant as in other cases, and
 properly make a part of pleadings generally, here only pleas
 applicable in covenant are selected.

8 Lev. 146,
 Heath v. Ver-
 medon.—
 2 Stra. 817,
 Palmer v.
 Ekins.

§ 2. First. It is a bad plea for the deft. to plead *nil habuit
 in tenementis* when the lease is by indenture, for he is estop-
 ped by it. Nor shall he plead a plea that amounts to *nil
 habuit in tenementis* in substance, though not so in words. As
 where the plt. in covenant declared as assignee of John
 Palmer and stated that March 27, 1716, said John Pal-
 mer being seized in fee of the demanded premises, by inden-
 ture between him and the deft., demised to him to hold twelve
 years at £18 a year, that the deft. covenanted to pay the rent
 and entered and enjoyed &c., that John Palmer being seized
 of the reversion, November 22 and 23, 10 Geo., by indenture
 of lease and release, between him and the plt. sold the rever-
 sion to him and his heirs, of which the deft. had notice, and
 then the plt. assigned the breach in the non-payment of the
 rent. The deft. pleaded, that John Palmer, November 19,
 1706, was seized in fee of the demanded premises, and by

lease and release of November 19 and 20, 1706, sold the same to John Bragg and his heirs, and traverses that at any time after that date John Palmer was seized in fee as the plt. alleged. To this plea the plt. demurred generally, and the deft. joined in demurrer, and after several arguments the court resolved: 1. That the demise being by indenture the deft. was *estopped* to plead *nil habuit in tenementis*; this all parties took for granted; [but not after evicted, 3 D. & E. 442.]

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§ 3. Second. That the deft's. plea was a special *nil habuit in tenementis*, and no more to be received than a general one. The plea is of Bragg's seizin in fee ten years before the demise to the deft.; and there is no more room to suppose Bragg reconveyed, for the deft. says that after Palmer conveyed to Bragg he was never seized.

§ 4. Third. That the plt. need not reply the *estoppel*, but might take advantage of it on demurrer, and so has been the practice. When an *estoppel* appears on the record, it need not be replied. Co. Lit. 303; Cro. El. 362; Skipwith v. Green, Stra. 610.

§ 5. Fourth. That an assignee may take advantage of an *estoppel*, for it runs with the land. Co. Lit. 152; 4 Co. 53; Salk. 276; who is one, Yelv. 36, 37.

§ 6. Fifth. That this plea was ill on a general demurrer.

Sixth. That if the plea did not amount to *nil habuit &c.* it was bad on account of the generality of the traverse, which tied up the plt. to prove the estate alleged in the declaration when any other estate would do; even a disseizin would do in this case, where it appears the tenant enjoyed under the lease, 2 Vent. 67; and it is no answer to say the deft. has traversed in the words of the declaration; for unless it be materially alleged, he is not to follow it, as in Colburn v. Stockdale, Stra. 493. Judgment was for the plt.

§ 7. Note. No notice in this case was taken that the deft. pleaded a prior title in Bragg to defeat Palmer's lease, when the deft. did not even set up a claim under Bragg.

§ 8. But the lessee by indentures is not *estopped* by describing lands in the lease; as if therein certain lands are called meadow, he may notwithstanding prove them arable; for descriptions in new leases are often taken from old ones, and this calling some of the lands meadow &c. is not of the essence of the deed.

Stra. 610,
Skipwith v.
Green.—Ld
Raym. 1154

§ 9. To plead *nil debet* to part, and *nil habuit in tenementis* to part, is double and bad; for *nil debet* admits the demise and *nil habuit in tenementis* denies that the lessor could make a demise; *nil debet* is bad where the action is solely on the deed.

1 Salk. 218,
Combe v.
Talbot.—
3 Lev. 170.

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2 Wils. 376,
Rogers v.
Payne.—
6 Co. 44,
Blake's case.
—Yelv. 192.
—Cro. Jam.
254.—2 Wils.
86.—5 Com.
D. 607, 608.

Cro. Jam.
254.—5 Co.
117, case of
Pinnel.—Neal
v. Sheffield,
Ch. 155.

3 Cro. 503.

5 Co. 117,
Pinnel's
case.—1 Stra.
426 —
1 Camp. R.
124.—7 East,
148.—2
Johns. 448.—
5 Johns. 268,
386, 392.
2 Wils. 86,
Preston v.
Christmas.—
Cro. Jam. 99,
Alden v.
Blague.—
9 Co. 79.—
Yelv. 125.—
Litt. s. 344.

Lutw. 358,
Snow v.
Franklin.—
1 Esp. 378.—
1 D. & E.
141.—5 Com.
D. 607.

§ 10. Second rule. A release pleaded not under seal, is a bad plea, and if a discharge be pleaded in the nature of a release it must be pleaded to be by deed, or it will be bad; for as the covenant is by deed, by deed also shall it be discharged as a covenant to pay money. The rule is clear, a deed must be discharged by deed; for the obligation of every instrument can be dissolved or discharged only by an instrument of as high or higher nature. The inferior can never discharge, dissolve, or destroy the superior contract, right, or obligation. But the question often is, what is to be discharged. Is it the deed or the damages claimed under it?

§ 11. In *Neal v. Sheffield*, debt was brought on an obligation of £14, conditioned to pay £7 at the birth of the plt's child. Plea, that before such birth it was agreed between the plt. and deft., that the plt. should accept a load of lime in satisfaction of the bond, which he accepted accordingly, such a day and place. The plt. demurred, because "the deft. pleaded that the plt. accepted the load of lime in satisfaction of the bond, which cannot be, but it ought to have been pleaded in satisfaction of the sum mentioned in the condition of the bond; for the bond itself cannot be discharged without specialty;" for this cause all the court held the plea bad.

§ 12. If a covenant be made with B, his executors, and assigns, in an action of covenant by the assignee, the deft. may plead B's release, though made after the breach in the assignee's time, but not after his action brought.

§ 13. In this case it was decided, that a less sum paid and accepted before the day may be a discharge of a larger sum in the condition of the bond, but not at the day of payment; but even then a horse or a hawk &c. may be so paid and accepted, for the court may intend that such horse &c. is more beneficial to the obligee than the money. So paying at another place at the day,—the payer directs the payment.

§ 14. Third. Accord &c. is a bad plea in case of a deed or single bond, as "in debt on a bond without any condition, the satisfaction must be pleaded to be by deed." But in covenant the breach was laid &c.; plea, accord &c., "that the plt. should take 30s. in satisfaction of the damages." This plea was adjudged to be good on demurrer; "for it is not pleaded in discharge of the covenant itself, but only in discharge of the damages, for the covenant remains." "For in every action where damages are demandable by way of amends, accord is a good plea in discharge."

§ 15. Accord &c. is not a "good plea in covenant till there has been an actual breach; for not till then can damages be estimated." As where the plt. declared, that in consideration that he would permit S. P. to enjoy a farm at Chipshom for

one year, the deft. covenanted to pay the rent, £72 a year, and also £200 then in arrear, and the breach assigned was the non-payment of the rent; the deft. pleaded that before any cause of action did arise on the covenant, it was agreed between him and the plt. that the plt. should take £30 in discharge of all covenants, which the plt. had accepted; on demurrer the plea was held to be bad; for at the time there was no covenant broken, and so no damages accrued, and accord and satisfaction is no good plea, except in discharge of damages, for covenant actually broken or damages sustained. But 1 D. & E. 139, 141, the master received £4. 4s. of his apprentice bound by indenture for the residue of his time, and held a discharge of the deed.

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1 D. & E.
139, &c., The
King v. Har-
berton.

This case of *Snow v. Franklin* is not without opposing authorities. This case in *Croke* was debt on a bond to pay £40 at Michaelmas eve; and the court held, that accord and satisfaction before this day of payment to pay £20 and a hawk, and the obligees acceptance thereof before this pay-day was a good discharge of the £40. This case is cited 1 Com. D. Accord A 1; and *Pinnel's case*, Ch. 155, is the same.

Cro. El. 46,
Anon.

And in this case the court said a lesser sum paid before the day of payment, or at another place than that limited by the condition of the bond, and the obligee or feoffee received it, this is a good satisfaction; and the court said *Pinnel's case* had never been questioned. Co. L. 212, is a like authority; 1 Ld. Raym. 122, *Allen v. Harris*; Leon. 19.

5 East, 283,
Fitch v. Sut-
ton.—4 Mod.
88.—2 Johns
R. 208, 213.

Debt on bond: on oyer of it and of the condition, plea, it was paid by the other two obligors (they and the deft. signed it) at the day, and acceptance in satisfaction by the plt.; plt. protesting the two did not pay, for plea said he did not receive in satisfaction *modo et forma*, and issue; and held the issue on the acceptance and not on the payment was proper. Urged the issue should have been on the payment, as he who makes payment directs it; but held, issue was right, and if a stranger pays, it is not good, but the creditor's acceptance is. And *Pratt C. J.* said, if a creditor has different debts, he may apply the payment to which he pleases, and no payment without acceptance.

1 Stra. 23,
24, Hawk-
shaw v. Raw-
lings.

The deft. owed the plt. £105. 5s. 2d. on bond, and become insolvent and agreed to pay him £73. 13s. 6d. being 14s. in the pound, and paid £70. 6s. in part, and the plt. sued for the balance £3. 7s. 6s. in assumpsit, and stated in consideration he had agreed to accept and receive from the deft. said composition 14s. in the pound &c., deft. promised to pay it. Judgment for the deft.; for this composition, accord &c. is not binding, because not executed, for no remedy lies on accord and satisfaction: so are numerous authorities. For

2 H. Bl. 317,
Lynn v.
Bruce.

CH. 121. "accord executory is only substituting one cause of action in the room of another, which might go to any extent." An accord must be completely executed in all its parts before it can have any legal effect. Even paying a part of the sum accorded, and tendering the residue will not make it a bar to the original cause of action. 9 Co. 79, *Peytoe's case*. Cro. El. 304, 305, *Rayne v. Orton*; accord of an account of £2. 10s. to pay 15s. in money, and 35s. in hats, and plea 15s. paid, and ready to deliver the hats; held, no bar to an action for the £2. 10s., for an accord or concord to be a bar "is always to be entirely executed, and not to be executory in any part."

5 Johns. R. 386, 392,
Watkinson v.
Inglesey & al.

Debtor's
plea, accord
and satisfac-
tion with his
creditors, as-
signed them
goods &c. ac-
cepted, and
held a good
plea.

4 Burr 2444
Mayor v.
Steward.—
4 D. & E. 94,
166, *Charl-
ton v. King*.
—2 Wils.
139.

There can be no doubt but that the accord &c. must be entirely executed to be effectual to bar the former action, or to be the ground of another action there must be something more than the mere accord: as where the parties settle a running account and the debt is found indebted to the plt. in \$100 balance, and for it gives him a bond, covenant, or note, no doubt either is this new ground of action.

§ 16. Fourth. Bankruptcy is a bad plea in covenant for rent, repairing, &c.—being an express and collateral covenant is not discharged under a bankruptcy and certificate; for it is not a debt due at the time of the bankruptcy, and so could not be proved under it; and if the rent be due before the bankruptcy, it must be stated. See *Aurial v. Mills*, above. Form of a plea of bankruptcy in bar of debt on judgment, 7 Went. 399, 414, 416.

2 W. Bl. 1312. § 17. Fifth. In cases of reciprocal covenants it is a bad plea, stating the plt. has not performed his part; for the debt. —Cowp. 56. may bring his action, see 3 Inst. Cl. 523, and therefore, it is —Doug. 690. no plea for the debt. that the plt. has not performed on his part in mutual covenants. —3 Wils. 387.

Co. Lit. 303.
—Cro. Jam.
560.—Pal-
mer, 70.—
1 Bac. 648.

§ 18. Sixth. If any of the covenants are to be performed of record, as to levy a fine &c., performance generally pleaded is bad. But performance must be specially shewn; for the record must be tried by itself, and its credit shall not be examined by the jury.

Stra. 681,
White v.
Cleaver.

§ 19. Seventh. A plea, saved harmless in the affirmative, not shewing how, is bad generally; for where one undertakes to affirm he has done a thing affirmatively, he ought to shew how he has done it, that the court may see that it is legally done and performed. Though according to cases before stated the *how* seems to be but form; hence the want of shewing *how* performed is not bad on general demurrer.

ART. 4. *Shewing how performed.*

2 Co. 1, 4, Manser's case.—1 Bac. Abr. 648, many cases cited.—3 Inst. Cl. 522.—5 Com. D. 609.—1 Com. D. 136, Accord C.

shall enjoy certain lands discharged, otherwise saved harmless from all incumbrances; the deft. pleaded the plt. had enjoyed them discharged and kept indemnified from all incumbrances. This plea was held to be bad, for being in the affirmative, the deft. ought to have shewn how; but if he had pleaded in the negative, *non fuit damnificatus*, it had been otherwise. By reason of several new distinctions in the books on this head, the cases, at first view, appear to be confused. Hence the doctrine of showing how performed &c. examined. But a little attention to some of the principal distinctions will remove most of the difficulties that at first view arise. The distinction just mentioned is material; for when one undertakes to plead affirmatively, that he has done a thing, as made a conveyance or a release of all actions &c., the court ought to be informed how it is done, whether well or ill, legally or not; and it clearly belongs to the party doing the thing and pleading he has done it, to shew how he did it, and to inform the court how or in what manner done: but when the party pleads negatively, as he may in several cases, that the other party is not damaged, the party so pleading merely denies the other party has sustained any injury, and leaves him to shew the injury, if he has sustained any; and to state it in such a manner as that the court may understand the nature and extent of it, and what damages &c. ought to be given for it; and this is the plt's. business, who claims the damages, when the deft. properly pleads a negative plea. Connected with this distinction is another material one made by Gaudy. As where one party undertakes to indemnify, and save another harmless, as to a particular thing, or as to a multiplicity of things: in the first case, the party engaging to save harmless, may well enough shew how; but in the last, it would be tedious and swelling the record very unreasonably, to plead and shew how, in each particular; and the court will not presume a failure in all, but only in some particulars, and leave the party claiming damages for the failures in performance to shew them generally; this is always the case when the deft. makes many covenants, in one instrument to the plt., and he states them all in his declaration, and assigns a breach in each and all of them, in order to recover damages on the breaches of each and all of them.

In the first case "the plt. declares he abated £10 of his debt," a particular act, he must shew how, that the court may see that the £10 is legally and sufficiently discharged.

§ 2. In the second case, Mason, the company's factor at Bristol, was bound to behave himself faithfully in their affairs, and when required to pay to the use of the company all the sums of money in his hands, and in his possession, received

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Cro. El. 258,
Acton v. Hill.
—5 Mod. 244.

Cro. El. 477,
Thornton v.
Kemp.

10 Mod. 227,
African Com-
pany v. Ma-
son.

CH. 121. by him for the company; the deft. pleaded performance generally. And the plt., in his replication, assigned for breach, that the deft. did receive of Jacob Reynolds and divers others, for the use of the company, several sums of money to the value of £376; and that he was required to pay the money, and had not paid it. The deft. demurred, and among other things, because this replication was too general and uncertain; and it was allowed and held, that in covenant, because the party is to recover damages in proportion to the damages assigned by the breach, and to prevent prolixity, such a way of pleading is permitted, but otherwise in debt on bond to perform covenants, there the breach assigned in the replication must be certain, and single, and of this opinion was the court.

§ 3. This case rather confirms the principle on which Gaudy made the distinction above; for in an action for the penalty, the plt., by the common law, could assign but a single breach, in any case, for the reasons before stated; and as a general rule, the court said, no hardship or inconvenience in requiring him to shew how this was, with certainty. But in covenant on many covenants, or some complex ones, to be performed by the deft., it was readily perceived that to require the deft. to shew how he had performed each one with certainty and in particular, or to require the plt. to assign a breach in each one, and to state with certainty and particularly how each one was broken, would require pleadings tediously long and hazardous to the pleader.

§ 4. The pleadings in the following case must have been allowed on similar principles. As where the deft. covenanted affirmatively, to acquit, discharge, and save harmless, a parish from the maintenance of a bastard child. In an action brought he pleaded, not affirmatively, in the language of his contract, but negatively, *non damnificatus*. And to this plea the plt. demurred. And judgment was for the deft.; because on the whole record it did not appear the parish was damnified. As there was a demurrer to the deft.'s plea, a question arises at first view, how the court allowed it to be good; for he did not plead affirmatively as he had covenanted, and shew how he had saved harmless, but only that the parish was not damnified. Probably this manner of pleading was allowed to avoid prolixity; for though but one contract to acquit &c., it was in its nature a complex one, and to have pleaded and shewn, how he acquitted, discharged, and saved harmless, must have been stating and shewing the particulars of the child's support &c., for years probably. To avoid this the negative plea must have been allowed, leaving it to the parish to assign a breach generally, shewing an injury sustained by it, and leaving particulars, as affecting the quantity of damages, to be shewn in evidence.

§ 5. So if the lessee plead he is disturbed, he must shew how, and by elder title. So if A covenant that he will make it appear to B, he must shew how the thing is. So to pay a moiety of a sum received, he must shew how much was received, and that he paid the moiety. But otherwise if the matters be multifarious, and tend to prolixity.

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§ 6. So a bond to save harmless against several particular things, and after in general. Here a general declaration *non damnificatus* is a good plea, and then the plt. must shew a breach.

2 Cro. 315.—
3 Cro. 5.—4
Co. 80.—
2 Lev. 125.—
1 Sid. 334.—
5 Com. D.
609.
11 Mod. 78,
per Holt C.
J.
Cro. El 393,
Hutchinson
v. Lawson.

This was debt on bond conditioned, whereas the plt. was bound in such bonds for the deft., and if the plt. was charged or molested in his body or goods thereon, the deft. within one month would satisfy him therefor. The deft. pleaded he had paid such a sum for all his charges within a month. The plt. demurred; and judgment for him. For the deft. should have shewn how the plt. was molested; and that he had satisfied such a sum, or that he was not molested. Had the deft. pleaded, as he might, that the plt. was not molested, he then must have replied and shewn a breach.

§ 7. This appears to have been a general demurrer; yet in a later case, in debt on bond conditioned to indemnify the plt., the deft., on *oyer*, pleaded generally, *quod indempnem conservavit*, without shewing how; and on general demurrer it was held, this fault should have been shewn for cause of demurrer; "for the substance is having saved harmless, and how that was done, is but matter of form."

Stra. 681,
White v.
Cleaver.

§ 8. So if A is to prove a debt is paid, he must shew how it is paid. So one must shew how he has performed a will. Cro. 360, Halsey's case. For this paying or performing is a single act, alleged in the affirmative, and to shew how performed tends not to prolixity.

Bend. 66.—
2 Cro. Jam.
166, Alington
v. Yearkner.
—5 Com. D.
398.

§ 9. This was debt on a conditional bond. Whereas the deft. by covenant and indenture sold an *advowson* to the plt. and his heirs, if he acquitted, discharged, and saved the plt. harmless from all bargains, statutes, incumbrances, charges, &c. the bond to be void. The deft. pleaded, he saved the plt. harmless, and the *advowson* from all bargains &c., as in the condition. The plt. demurred, because the deft. did not shew how he discharged &c., which should be particularly shewn, and of that opinion was all the court. But according to Lutw. 608, 609, such pleading may do.

Cro. J. 166,
Alington v.
Yearkner.—
5 Com. D.
398.

§ 10. So in debt on bond, conditioned to save the plt. harmless from such bail in such an action. The deft. pleaded, he freely and absolutely discharged the plt. from the said bail. The plt. demurred, because the deft. did not shew how he discharged him: and judgment for the plt.; "for always when one pleads a discharge, and that he saved him harmless,

Cro. Jam.
363, Codner
v. Dalby.

CH. 121. he ought to shew how, that the court may judge thereof."

Art. 4.



"But he may plead generally, *non damnificatus*, without shewing how; because he pleads in the negative, and the other ought to shew the damnification."

Leon. 172.—

1 Bac. 549.—

Kelw. 95.—9

Co. 25.

§ 11. So if the condition be to convey an estate, in pleading it, the deft. must shew by what manner of conveyance it was done. So if the condition be to shew a sufficient discharge of an annuity, in pleading performance, it must appear what manner of discharge it was, that the court may judge of it, whether sufficient or not; for the jury cannot inquire of it, but the judges must judge of it, and this they cannot do if the special matter be not shewn to them.

§ 12. But in pleading a saving harmless, or a discharge, the case is to be considered, whether by deed or otherwise.

Cro. El. 913.

914, King v.

Hobs.

§ 13. The plt. alleged he had discharged the deft. from an arrest, and he had not paid thereon as was agreed &c. One error assigned was, because he says he discharged him of the arrest, and did not shew how. But the court held it well enough; for it need not be pleaded as a discharge of a bond or rent, which ought to be shewn; for they cannot be discharged unless by deed. But the discharge of an arrest may be by composition &c., or by matter in *pais* &c., so it need not be shewn.

Cro. Jam.

339, Freeman

v. Sheen.

22 Ed. IV. 21.

—8 H.

VII. 6.—20

H. VI. 18.—

22 H. VI. 39.

So in debt on bond, conditioned to perform the award of J. S., and he awards, that the deft's. suit in chancery against the plt. shall cease, and the plt. stand acquitted of every matter therein contained. The deft. may plead the plt. is thereof acquitted without shewing how, or that he in fact discharged him; for it was not intended an actual discharge should be given, but that by the award itself he should be acquitted; but it had been otherwise, if the award had been that he should discharge and save harmless from a certain obligation, then he must have shewn to the court how discharged.

Cro. El. 749,

Ments v.

Bethel, & 916,

cited 5 Com.

D. 399.

§ 14. In debt on a bond conditioned that the deft. at all times, upon request, should deliver to the plt. all the fat and tallow of all beasts which should be killed or dressed by the deft., his servants, or assigns, before such a day; the deft. may plead, that upon every request to him made, he delivered to the plt. all the fat and tallow of all beasts &c., without shewing how many beasts were killed or dressed, or what quantity of fat he delivered; for when matters tend to infinity and multiplicity, on the record, the law allows a general pleading in the affirmative; and by that reason allows of the rule, "that he who pleads in the affirmative shall allege performance of covenants generally." "And it hath been resolved by all the justices of England, that in debt upon an obligation to perform covenants in an indenture, it is sufficient

to allege performance generally." "So where one is obliged to deliver all his evidences, or to assure all his lands, it sufficeth to allege that he hath delivered all his evidence, or assured all his lands." "And it ought to come on the other side to shew the contrary in some particulars." There is also the same rule in regard to a covenant to pay all rents, or to discharge all bonds; so to acquit all escapes.

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Kelw. 95,
contra.—1
Sid. 384.—1
Cro. 916.—
Mod. 857.

§ 15. So where an under sheriff is bound to discharge his master from all accounts and returns of writs within the county, he may plead performance generally, for more things are referred to than the law will intend can be remembered; otherwise if the contract be to repair, pay rent, and do other things. This last case is not multifarious, &c.

1 Bac. Abr.
549.—Mod.
857.—
Kelw. 95.

§ 16. But one may be held to shew the manner of discharge, though not to plead specially, as to many particulars. As in debt on bond conditioned to discharge and save harmless from all obligations, which the plt. had entered into for the debt. The debt. pleaded, he discharged and kept indemnified from all obligations, &c. An exception was taken because he shewed not from what obligations. But the court said, it was well enough; for there may be very many of them; "wherefore, to avoid prolixity in pleading, the law allows this plea to be sufficient." But another exception was, because he pleaded not *quomodo exoneravit* &c., but generally; and this exception was allowed; for it must appear to the court to be done in a legal manner, and therefore the pleader must shew how.

Cro. El. 916,
Braban v.
Bacon.

§ 17. This was debt on bond conditioned to perform covenants in an indenture. The first was, that the debt. should marry the plt's. daughter S. before such a day: 2. That E. S. and his wife should levy a fine of such lands to the debt. and to said daughter of the plt., in tail: 3. That the inheritance of the premises should remain in said E. S., or himself, until the fine levied: 4. Whereas he had granted a lease for years of part of Marshwood to said S., the plt's. daughter, that he had not made any former grant, nor would afterwards make any grant thereof, without the plt's. assent. The debt., as to the last covenant in the negative, pleaded, that he had not made any former grant of the lease, nor made any grant after the obligation, without the plt's. assent; and as to all the other covenants, that he had performed them. The plt. demurred: 1. Because the covenant to levy a fine &c. is an act to be performed by a stranger, and it is an act to be performed on record; in both which cases he ought to plead, and shew how he performed it; and it is not sufficient to plead general performance: for acts of record ought to be shewn specially, and the answer to them is *nil tiel record*, and no other issue can be taken: 2. The cov-

Cro. Jam.
559, 560, Lea
v Luthell;
cited, Co. Lit
303.—Hob.
295.—2 H.
VII. 10.—13
H. VII. 1.—5
Ed. IV. 8.—
21 Ed. IV.
75.—Dyer,
56.—8 Co.
133, Turner's
case.—14 Ed.
III. 5.—12 Ed.
IV. 4.—1 Cro.
422.—2 Cro.
87.—3 Cro.
232, 233.

CH. 121. enant being in the disjunctive, he ought to shew specially
 Art. 4. which of them he performed, and not generally: 3. He plead-
 ed he did not grant without the plt's. assent, which is a *neg-*
ative pregnant and bad, and of this opinion was all the court.
 But Kelw. 95, contra, as to the act of a stranger.

It is said in some books, that where the facts, though numerous, are all in the knowledge of the party pleading, he must enumerate them, and plead performance specially. As where he is to pay all the legacies in a will, he must specify them all, though several, and aver payment of each, for each legacy is a specific thing; nor is this inconsistent with the general distinction above taken.

1 D. & E. 753, § 18. And the rule in pleading, says Buller, is this, "that
 In Janson v. wherever a subject comprehends multiplicity of matters, as a
 Stuart; cited bond to return all writs &c., to avoid prolixity, generality of
 2 Saund. 411. pleading is allowed; but if there be any thing specific in the
 subject, though consisting of a number of acts, they must be
 enumerated, as on a covenant, to infeoff of all lands, the cov-
 enantor in shewing performance must state them all." "And
 the reason is, because all these facts lie within the knowledge
 of the party."

2 Saund. 411, § 19. As where a condition was, that the deft. appointed
 Cornwallis v. agent of a regiment, should well and truly pay all such sums
 Savory; cit- of money as he should receive from the paymaster-general
 ed from 2 Burr. 772. for the use of the regiment, and faithfully account and indem-
 nify the plt.; plea, a general performance, and that the plt.
 was not damnified; the plt. in debt on the bond, replied,
 that the deft. received from the paymaster-general, for and
 on account of the said regiment, several sums of money
 amounting in the whole to £1400, but the deft. had not paid
 them; and on demurrer it was held, the breach was sufficient-
 ly assigned.

1 Bos. & P. § 20. This case of Shum v. Farrington, was on the same
 640 Shum v. principle and thought by the court to be better law than that
 Farrington. of Jones v. Williams, Dougl. 214. 'Hoc paratus by the plt.
 in both these cases. Arlington v. Merrick, 2 Saund. 411; 2
 Call, 510; 3 Call, 524.

5 Taun. R. § 21. Plt. brought covenant for seven quarters' rent. Deft.
 27, 28. pleaded a surrender before the last four accrued. Held bad
 on demurrer, as the plea did not answer the breach, and the
 breach is not entire, but a part of it may be proved.

10 Johns. R. § 22. A bond for the *honesty* of a teller in a bank, and
 271, 273, Un- not his ability. The condition was, that the first teller in the
 ion Bank v. Union Bank should *well and faithfully* perform his duties as
 Clossey & al. first teller &c. Held, this bond only applied to his *honesty*,
 and not to his ability in the trust; hence his sureties were not
 liable for losses arising from his mistake; but the condition

was performed, as he was honest. *Quære* was the word *well* CH. 121.
properly construed? Art. 5.

§ 23. *Bond and condition when valid, and breach well as signed*: 1. If a statute direct an officer's bond conditioned to collect and pay taxes, to be given to the State Treasurer, it is valid though given to the State: 2. The court, after verdict, presumes an obligor not sued is dead: 3. When the condition is to pay money, the bond is a part of the record; *secus* if collateral: 4. A breach is well assigned, if in substance in the words of the condition: 5. Plt. may recover more damages than laid. *Washington v. Smith*, 3 Call, 13; 1 Call, 249; see *Stuart v. Lee & al.*, 3 Call, 421.

ART. 5. *Several cases.*

§ 1. In this case the plt. covenanted, if the deft. would pay £40 he would convey as the deft's. counsel should advise, and sued for the £40. The deft. pleaded, that the plt. did not convey as the counsel advised. The court held, this plea was bad; for it should shew the manner and what the counsel did advise: and 2. There being mutual covenants, one was not pleadable in bar of the other. 3 Inst. Cl. 513.—1 Keb. 178.

§ 2. If the deft. covenant, or engage, that a third person shall give a release to certain lands, it is a bad plea to say he had no title, for there ought to be a release *de facto*. As where the deft. agreed that when two minor daughters come of age they should release &c., and he pleaded that they never had or claimed any right or title, estate or interest, in the land; and the plt. demurred, and had judgment. 4 Inst. Cl. 48 to 51.

§ 3. So in debt on bond to perform covenants, *no covenants* is a bad plea, for then the bond is single; and so that there is *no such indenture*, for he is estopped; so *nil debet* is a bad plea, though the action of covenant be founded on the indenture of demise, and a breach is assigned for non-payment of rent. Cro. El. 756.—1 Rol. 408.—3 Lev. 170.—5 Com. D. 606, 607.

§ 4. In debt on a bond conditioned to perform covenants in an indenture and assignment &c., on *oyer* of the bond and condition; the deft. stated the indenture, and pleaded performance of covenants generally. The plt. replied, that one T. before was seized until R. disseized him, and leased to the deft., who assigned to the plt., on whom T. re-entered and avoided his estate. The deft. demurred, and judgment for the plt., that his replication was good. In this case by the assignment stated by the deft., it appeared he covenanted the lease contained a perfect indefeasible demise in law, and so it should be to the plt. for the residue of the term; and that the plt. should quietly enjoy during said residue of the term &c., without the interruption &c. of the deft. &c., and saved harmless of all incumbrances done by the deft., except the rent 4 Inst. Cl. 59, 65; cited 1 Saund. 51, 52.—Winch R. 74, 87, Napper's case.—Andr. 93.—Latch, R. 105.—2 Cruise, 288.

CH. 121. and covenants in the original lease,—pleadings as above. It
 Art. 5.



was argued for the deft., that the plt. had not well assigned the breach; for it appears the plt. was not ousted by the deft., or any claiming under him, but by one Townly, a *stranger*; though he had covenanted that Paget's lease was *indefeasible*, the latter words, that the plt. should enjoy without interruption of the deft. &c., proved he only covenanted against himself, and those only claiming under him; and cited several cases to shew that one part of a sentence shall be restrained and expounded by another, as Dyer, 240, 255; Winch's R. 91, 93; and concluded the former covenant was expounded and limited by the latter, but denied their application to this case; for here the former covenant is not restrained by the after words. The cases in Dyer were one entire sentence; here distinct covenants. An express covenant, in fact, is never restrained by another subsequent covenant, if the latter cannot be construed as a part of the first general covenant; and where a restrictive clause is in the first or latter part of a sentence, or in the beginning of the first, or at the end of the latter sentence, which in good sense may be applied to the one or the other, it shall extend to both, but if in the middle of one or two sentences, as covenant, he was seized in fee, notwithstanding any act done &c., and that the lands were worth £200 annually, the words, *notwithstanding &c.* cannot extend to the covenant as to the value, because in the middle of the sentence. So here the words in the last covenant, (*without interruption &c.*) cannot be applied in sense to the covenant that the lease was *indefeasible*; for then the sentence would be insensible, to wit: that the lease was *indefeasible* without interruption of the deft. The words, *without interruption &c.* do not take away the force of the word *indefeasible*, but it remains an absolute general covenant as before; then the lease being defeated by a stranger was a breach of the covenant, and so the replication good; and of this opinion was the whole court.

4 Inst. Cl. 91,
 92.
 If an estate
 vest by a
 deed, can-
 celling it
 does not di-
 vest the es-
 tate. 4 Cru.
 369.—2 H.
 Bl. 259.—
 Shep. T. 70.

§ 5. If the deft. plead the indentures were cancelled by consent, he must shew performance before. Debt on bond conditioned to perform covenants; on *oyer*, these appeared to be cancelled. The deft. confessed the making of them; but said at — on — by consent of the plt. and deft. the indentures and covenants were cancelled, and the plt. cancelled and did wholly avoid the same. The plt. demurred, and judgment for him, "because the deft. did not aver performance of all the covenants before the indentures were cancelled." And before some might have been broken and damages accrued. Cancelling by consent makes void. 4 Cru. 370.

4 Inst. Cl.
 114, 115.

§ 6. The deft. cannot plead the five years are not expired

in this case, to wit : the deft. covenanted to pay £5 a year for five years towards the education of his daughter : plea, five years not yet expired. This plea was adjudged bad on demurrer, for debt lies for each payment from year to year. These covenants in their nature are several, and to pay annually.

CH. 121.
Art. 5.

1 Maule &
Sel. 706.

§ 7. Covenants in the disjunctive, performance how pleaded. As where the lessee covenanted to leave at the end of the term two mill-stones as good as he found, or pay the difference in money as viewers should judge. Debt on bond made by the deft. to the plt's. testator, conditioned to perform covenants in an indenture. The deft. stated it, and averred he left two mill-stones, and the parties had not agreed on the goodness of those there when he entered, nor how much those he left were worse &c., and pleaded covenants performed generally. The replication was, that the deft. did not leave so good mill-stones as he found, and those found worth £3, nor gave any satisfaction in money &c., *hoc paratus*. The rejoinder repeated the bar, and *hoc paratus*. The plt. demurred.

4 Inst. Cl.
136, 140.

And it was said for the plt. the deft. was bound to get the persons to judge the difference who viewed the stones found there &c.; and that his default herein was a breach of the covenant; that the disjunctive covenant was an advantage to the covenantor, hence he should shew he performed the one or the other. The deft. said that if one part of such a covenant became impossible, the covenantor is excused performing the other part; but the court held there was no impossibility in the case. If the viewers could not be procured to adjust the damage, one part, the deft. might have left as good stones as he found, the other part of the covenant; and the disjunctive condition being for his advantage, he ought to have procured the viewers to fix the difference or damage. Judgment for the plt.

Dyer, 262.—
21 Ed. III.
29.—15 H.
VII.

§ 8. If A sell lands to B, and covenant he is seized of a good estate in fee, according to the deed made of it to him by W. and is not seized of such an estate, covenant lies against A, for his covenant he is seized is absolute, and the reference to W's deed imports only the certainty of estate, not of title.

Pow. on Con.
401, Cooke
v. Founds.

§ 9. If covenants are in the disjunctive, the deft. ought to shew which he has performed; as if he be to pay in one or six months after such a day, he must shew on which he paid; for the court cannot know what part is performed, and it is bad on general demurrer, and unless the court can see what part is performed it cannot see there is a performance in substance.

Co. Lit. 303.
—2 Cro. 560.
—3 Cro. 421.
—5 Com. D.
397, 398.

CH. 121. § 10. When matter of record is pleaded, the plea must conclude, as appears by the record, and when so, *hoc paratus* is bad ; so then issue to the country, or a fact added and issue to the country, is bad. And if several records are pleaded,

Art. 5.

5 Com. D.
400, 609.

there ought to be a conclusion to each, but if a general statute be pleaded, it is not necessary to say, as appears by the record ; for the judges, *ex officio*, take notice of public acts of parliament or statutes.

1 Ch. Pl. 116,
482, 483.

2 Ch. on Pl
486, Warner
v. Theobald.

—Cowp. 588.

1 Phil. Evid.

171, Pitt v.
Green.

8 D. & E. 487.

—Stra. 817.

—2 Saund.

206.—Bull.

N. P. 165.—

1 Bos. & P.

640.—8 D. &

E 366.—1

Saund. 235,

241.—9 Co.

79.—1 East,

633.—4 M.

& Sel. 70.—

5 Burr. 707.

§ 11. In covenants there is strictly no plea that can be termed the general issue. *Non est factum* only puts in issue the fact of sealing the deed ; and *non infregit conventionem* and *nil debet* are insufficient pleas. And hence most matters of defence must be specially pleaded. See Ch. 121, a. 2, s. 5 ; though *non fregit conventionem* is bad on demurrer, it is good after verdict. So *riens in arrere* is bad in this action. Hence every matter the deft. must plead specially, necessary to be pleaded in debt on specialty, Com. D. Pl. 2 V. 4, &c., as that the deed was voidable by infancy or illegality of the consideration. However, in the trial on *non est factum* the deft. may avail himself of a variance in the statement of the deed. 9 East, 188. And if the plt. omit to state a condition precedent the deft. may crave *oyer*, and set out the deed and demur. Com D. 2 V. 3, 4. How the deft. may plead specially to shew he is not liable, see several cases, 1 Ch. on Pl. 482, 483, and these cases more at large, *Blake v. Foster*, Ch. 55, a. 3, s. 12 ; Ch. 119, a. 3, s. 3 ; Ch. 174, s. 21 ; *Andrew v. Pearce*, Ch. 105, a. 2, s. 14 ; *Shum v. Farrington*, Ch. 121, a. 4, s. 20 ; *Wotton v. Hele or Hyde*, Ch. 115, a. 4, s. 25 ; Ch. 116, a. 1, s. 4 ; Ch. 120, a. 3, s. 9 ; *Stevenson v. Lambard*, Ch. 105, a. 1, s. 39 ; Ch. 123, a. 2, s. 1 ; *Glazebrook v. Woodrowe*, Ch. 118, a. 3, s. 1 ; *Thursby v. Plant*, Ch. 110, a. 8, s. 2 ; Ch. 114, a. 4, s. 4 ; Ch. 123, a. 2, s. 1 ; *Charlton v. King*, Ch. 121, a. 3, s. 16 ; *Peytoe's* case in several chapters, as in table of cases ; and many other cases of defence specially pleaded in this action in this work. But *riens in arrere* is a good plea in debt for rent, though not in covenant, as this action is for damages. 1 Ch. on Pl. 114 ; Cowp. 588.

2 Ld. Raym.

1500, War-

ren v. Con-

sett.—1

Saund. 237,

241, Thurs-

by v. Plant,

cited 1 Ch.

on Pl. 212.—

1 Saund. 282.

—2 H. Bl.

135.

§ 12. So the plt. may elect to sue on covenant in order to oblige the deft. to plead to a particular point. As in covenant for rent, the deft. must plead to some particular allegation made in the plt's. declaration, as there is strictly no general issue in covenant, but in debt he may plead *nil debet*, and oblige the plt. to prove his whole declaration. So in some cases the plt. may elect debt or covenant for the same injury ; as if he be assignee or devisee of the lessor, and have rent due from the lessee, the plt. may elect debt, then his action is

local, or covenant on the express covenant, then his action is transitory. See sundry cases, in which are advantages or not in such elections, Willes, 221; 1 Saund. 346; 2 W. Bl. 1112; 1 East, 244; 3 Bos. & P. 465; 3 East, 70; 1 H. Bl. 310; 6 D. & E. 363; 2 East, 305; 2 D. & E. 639; 6 D. & E. 695; 3 East, 600; 6 D. & E. 129; all stated in this work as applicable to different heads. The plt. in declaring on covenant may, except in two cases, stated Ch. 123, a. 2, s. 12, elect not to state a consideration of the covenant declared on, but if he do state one or a title, though unnecessarily, he must prove it as stated, unless merely impertinent, for he sues on contract where generally he must prove it as laid. *Secus*, in cases of torts, where he may prove a part of the case he states, and if he state a title to common, a way, &c. he need not prove the same title he lays in his declaration. As in an action against a tenant for bad husbandry, the plt. stated the deft. was tenant to the plt's. father, and that the lands descended to the plt. in fee, and proved they were devised to him in tail; held, the variance was immaterial, and the court said the rule is, that on the general issue in an action on the case, all material averments are denied and put in issue, but nothing else. The plt's. estate was not a material averment, and might have been rejected as surplusage. It is enough he prove sufficient matter to make him a good case, not so usually in cases of covenants and other contracts. So when the plt. leases lands by covenant, and the lessee holds over, and no new terms, he becomes liable in *assumpsit*, but on the terms of his lease,—and best one count in *assumpsit* state the covenants the holding over &c.

§ 13. *Forms*. Pleadings &c. in covenant. Debt on bond, *oyer* of condition. This was to perform covenants in an agreement, and other matters in a bond as to the management of an inn of the plt's., entrusted to the care of A B. Plea, general performance of affirmative covenants, and special compliance with negative ones. Replication, assigning breaches for embezzling wine and making false accounts; rejoinder and issue on the breaches. *Postea* containing verdicts &c.

CH. 121.

Art. 5.

See Ch. 123.

a. 2, s. 12.—

Ch. 121, a. 5.

—2 W. Bl.

840, 842,

Winn v.

White.—

2 Bulstr. 288,

Willamore v.

Bamforde.—

1 Stra. 230,

Aleberry v.

Walby, cited

1 Ch. on Pl.

372 —1

Saund. 246.

B. N. P. 76.

2 Ch. on Pl.

134, cites

Rex v. Ward.

7 Went. 451,

455.—See

Ch. 124, a. 7,

a. 8.

CHAPTER CXXII.

AN END PUT TO THE COVENANT, OR RESCINDING.

ART. 1. *General principles.*

§ 1. The idea an end is put to the contract by the act of one or of both parties, by the act of the law, or by the act of God, or by some implication, or unforeseen event, has already several times occurred. Many cases to this purpose have been cited; especially several cases in American Precedents, 89 a to 89 j, where the party may consider the contract as rescinded, by an act of a party, or by an act of God. So accord and satisfaction in a former chapter; several cases in actions for money had and received. So as to agreements, sect. 11; seal torn off; laws made dissolving contracts; contracts dissolved by implication, and events not foreseen; embargoes, tempests, sickness, &c.; affecting maritime contracts, covenants as to repairs, affected by inundations, fires, &c. So as to paying rent; covenants discharged &c. already treated of in former chapters.

§ 2. This question has and must often arise, to wit, "when is an end put to a covenant," a deed under seal; and only some leading principles can be noticed. The subject may here be further pursued, and several rules laid down, and illustrated, and so as that the grounds of decision may be seen.

ART. 2. *General rules and cases.*

§ 1. While a covenant or contract is executory, the parties to it may rescind it or put an end to it, by some proper act; for its essence being a right vested in one party, and an obligation on the other, it is clear they may rescind, at any time before executed, by all parties dissenting or receding from the contract; for every contractee may relinquish his claims under the contract, and discharge the contractor, and when he concurs, the consent no longer exists necessary to carry the agreement into effect. But generally if the contract be by deed, as if two exchange land by deed, and neither enters, they by mutual consent may annul the exchange, so it be by deed and not by parol. So if B, lessee for twenty years, under-lease for ten years to C, and then take back a lease from him for five years, this is no surrender, but a dissolution of the contract; for a lease of land is but a contract executory from time to time, of the profits to arise, as one may sell

them to be received from year to year, for many years to come.

CH. 122.
Art. 2.

§ 2. Covenants and contracts may be waived by the acts of all parties. As where tenants had common, and paid quit-rents to the owner of the manor, and they agreed to inclose, and by a separate deed, released the rent to each tenant, and he by another deed of like date, consented to the inclosure and to give up his common in the inclosed lands. The inclosure was begun but given over; the deeds remained uncanceled; the tenants continued to enjoy the common, and pay their rents &c. twenty-five years, and as if no such deeds had been made. The court held, the subsequent transactions, as to enjoying the common and paying rent, amounted to a waiver of the agreement. In this case a contract by deed, to inclose &c., was dissolved by acts of the parties in giving up the inclosure and going on as before, and deeds ceased to have force by acts *in pais*, according to this case. 1 Hen. & M. 428, 449, similar case.

Pow. on Con.
413, Lady
Lanesbo-
rough v.
Ockhott.

§ 3. The parties cannot dissolve a covenant or contract when a third person has power to complete it. As if A covenant with B for wheat, at such a price as J. S. shall name, if he refuse to set the price, the contract is void; but the parties cannot annul it, for they have empowered him to perfect it. So if A enfeoff B to the use of such person as J. S. shall name within a year, if he name, the contract is not revocable; for the use passed immediately, and the contract is executed by the operation of law. The first case must be if the parties do not revoke the third person's power, being a naked authority to name the price, they who gave it might revoke it.

Bacon's Max-
ims, 91, 92.

§ 4. When the time is passed for performing the contract, it cannot be dissolved; it is then perfect, and a right is vested, but the right may be released. It is one thing to dissolve a contract, and another to release or to surrender the thing contracted for. A release may be by a new instrument, or by cancelling the old one, expressed or implied; but if the right vested be in covenant and by deed, the implied release must be by acts done, and not by parol, or merely by words; according to some by deed. As in this case of debt on bond for £80, conditioned to perform certain covenants. Plea, that it was agreed between the plt. and deft. that he should grant an annuity of £5 out of certain lands, for life, in discharge of the bond; that he made this grant, and the plt. accepted it in discharge of the bond. The plt. demurred; and judgment for him; "for it is but *concord* and *verbal* agreement, and cannot discharge a specialty." So when a contract has become a *res adjudicata*, it can no longer be resounded.

Cro. Jam.
649, 650,
Noyes v.
Hopgood.

CH. 122.

Art. 2.

8 Co. 92.—

Co. Lit. 206.

18 Ed. IV. 8.

Pow. on C.

416.—Cro.

El. 374, Car-

rel v. Read.—

18 Ed. IV. 9.

—Noy's

Max. 12.

Pow. on C.

422. Powell

v. Haukey.

Atk. 269, Ri-

dout v. Lewis.

—Wingfield

v. Whely, 5

Vin. Abr.

634.—9 Mod.

2.—1 Vern.

240.—4 Com.

D. 99.—1 Bos.

& P 306,

Walker v.

Constable.

Pow. on C.

423.—6 Co.

46, Higgins'

case.—Cro.

El. 817, Pres-

ton v. Preston.

§ 5. If the fulfilling a contract is for my benefit, and I am the cause of its not being fulfilled, it is at an end, and the other party is discharged; as if one covenant to convey land to me on such a day, and I disseize him, and keep possession till after the day, so that he cannot enter. So if A covenant to build me a house on my land, by such a day, for £100, and when he is ready to enter on the work I forbid him, this excuses him, but he may recover the £100. So if to build in five years, and I forcibly keep him out the last three years. So if one covenant to drain my land by such a day, he being lessee, and afterwards, and before the day, I enter and keep him out, and disturb him in doing it, this annuls the contract or covenant. So if one be bound to convey such lands to me, and on the day I refuse his tender of a proper conveyance, he is forever discharged. So if one be bound to me to appear on a certain day named, and before and at the day I imprison him, he is discharged and his bond is void. In none of the cases do I discharge or release by deed, writing, or record, but merely by acts in *pais*, as by disseizing, forbidding, &c.

§ 6. The right by covenant, or contract, may be abandoned. As if there be a valid contract between husband and wife, before their marriage, to secure her property to her sole use, and she constantly permit him to receive the interest, if personal estate, in the funds &c., or the rents and profits, if real estate, the law intends she consented to his receipt of it, but this being but an intendment of law, it may be rebutted by parol evidence, and shewn that she did not mean to abandon her right to such separate estate. Therefore when a wife had £300 a year settled upon her, as her pin money, and received but £200 of her husband, for several years before his death, and she complained of this, and he told her she should have it at last, the Lord Chancellor allowed her to recover the arrears of his representatives. Here was no series of acts in *pais* done by the parties or covenantee, contrary to the deed, as there was in Lady Lanesborough's case, and in the fifth head or rule above, so open to such intendments and rebutters. If abandoned this must be shewn, if made the grounds of the suit, that it has existed, and the specific contract must be shewn.

§ 7. A contract of an inferior degree is dissolved by one of a superior, as if one owe me on simple contract, and give me a bond for the debt, the simple contract is at an end. So a judgment determines a contract for the same debt; but if the recovery be in a court not of record, the obligee may have an action of debt on the bond in a court of record; for in this case the bond is not changed into a thing of a higher nature;

nor is it by being recorded, as on a statute staple ; for a *bond*, and a *bond recorded*, are of the same nature ; and contracts and records, of equal degree, do not dissolve each other. Hence if A give me a bond for a debt due to me on another bond, one does not avoid the other. So where the plt. recovered judgment in the Kings Bench, and then sued that judgment in the Common Pleas, and had judgment there ; then he sued a *scire facias* in the Kings Bench on the said first judgment, there to have execution ; to this the latter judgment in the C. B. was pleaded in bar, and held to be no bar, on demurrer, "because one judgment cannot determine another judgment," being of the same degree.

§ 8. A contract entered into by deed, cannot be discharged by acts of the parties by parol. Therefore if a bill or deed to pay me money be delivered up, it will not be discharged or avoided, so it is no plea to say I re-delivered it in lieu of a release, if I regain possession of it. On this principle accord and satisfaction is no discharge of a covenant ; "for a covenant being created by deed, cannot be discharged but by deed." See the true distinction, Accord and Satisfaction, as to a deed and default subsequent, and *Snow v. Franklin*, ante. See also second and fifth rules, above. And in the principal case, if I delivered up the deed for a consideration, it was surely at an end ; and my regaining possession of it and attempting to recover on it would be a clear fraud.

§ 9. Part of what is agreed, omitted in the deed by fraud or mistake or surprise, may be shewn. As if it be agreed there be a lease for the life of the deft's. wife, and the plt. writes the deed and the deft. signs it, and he, the lessor, only by making his mark, and there is omitted in the deed a clause intended in the agreement that the tenant, the plt., pay the rent clear of taxes, as a reason for sinking the rent from £14 to £9 a year. Lord Hardwicke admitted the deft. to read evidence of this omission caused by the plt. himself in writing the lease, and it is quite equal whether insisted on as a mistake or fraud. This was in chancery, the deft. was *illiterate*, and the mistake or fraud was the plt's. fault ; and as a deed never can be allowed to cover a fraud, perhaps as much would be admitted in a court of law, between which and chancery there is no difference but in the manner of proving the fact.

So a mortgage is agreed upon, the mortgagee draws it and the mortgagor is illiterate, and the covenant to redeem is omitted. The mortgagor will be allowed to prove this omission in equity ; and at law, if any deceit or fraud be proved in the mortgagee. So if a mortgage be in two deeds, one an absolute conveyance, the other a defeasance, and the mortgagee omit to execute the defeasance, the mortgagor shall be allowed to show the mistake or omission.

CH. 122.
Art. 2.

Pow. on C.
426, & Alden
v. Blague,
Cro. Jam. 99,
& Blake's
case.—
Contra, Rob-
erts v. Stoker,
Lutw 358.

3 Atk. 388,
Joynes v.
Statham.—
Powell on
Con. 433.
See 7 Ves. jr.
211 —6 Ves.
jr. 328. See
Clarke v.
Grant, 14
Ves. jr. 519.
—15 Ves. jr.
523.—1 Ves.
& Bea. 376,
Winch v.
Winchester.

CH. 122.

Art. 2.

2 Vesey, 377,
S. S. Compa-
ny v. D'Olive.
Pow. on
Con. 434.

So a variation shall be corrected. Thus by agreement the South Sea Company was not bound to answer for any fault of supercargoes, unless information was given in two months after their return home. The instrument was written in a great hurry on board the ship, and executed by the party, who, when at sea, found it was six months instead of two months, and Lord King, on the variance being found by a jury, granted the party relief. The reason in all these cases seems to be, the evidence offered is no variation of the agreement, but consistent with, and explanatory of it only, and strong circumstances of fraud and mistake pervade all these cases. Such evidence is never suffered to contradict or to explain away an explicit agreement; for to do this would be to let in all the frauds and perjuries the statute of frauds meant to guard against. To contradict a writing by parol evidence, or to let in such evidence to explain where it is explicit, is quite one thing; to prove facts by such evidence as to which the writing is silent or very ambiguous, is quite another.

2 Wils. 275.

-W. Bl. 1249.

But when there is no fraud, "no parol evidence is admissible to disannul, or essentially to vary a written agreement: and so is the case of *Mens v. Ansel*; also the case of *Preston v. Merceau*, which see in parol evidence; and also thereon many other cases to the same effect, as *Meath v. Belfield*, *Mildmay's case*, *Cook v. Booth*, *Furpival v. Crew*, *Green v. Horne*, *Robinson v. Drybough*, *Rex v. Inhabitants of Laindon*, *Bridges v. Hitchcock*, and 1 Br. P. C. 522.

And except such cases as are above stated, partaking considerably of fraud, parol evidence has not been admitted to shew agreements to be otherwise than is expressed in the written agreement. Materially to vary a contract by evidence *dehors*, and to annul it, is often the same thing; still, however, on a view of all these cases, it often remains a question what acts in *pais* put an end to a deed, or bar an action on it.

§ 10. A covenant or contract annulled by meeting in the same person as to the right and the obligation, as one cannot be bound to himself; as Ch. 29, a. 8, the effect of making the debtor executor &c., and the distinction between suspending and annulling.

1 H. VII.

16 a.—Pow.
on Con. 439
to 446.—

Hob. 216,
Smith & ux.
v. Stafford.—
Cro. J. 571,
Clarke v.
Thompson.

And if a man be bound in an obligation to a *feme sole* and then marry her, the contract is dissolved by the act of law, by the union of the right and of the obligation in him. But marriage does not extinguish all contracts of the kind,—as in the chapter respecting *baron* and *feme*. The general principle seems to be, that if a man contract with his intended wife to leave her property after his death, and so the contract is not to be executed during the marriage, and in that time no action

is to accrue, this contract is not dissolved or extinguished by the marriage. To the same effect is *Gage v. Acton*, where the man gave a bond to his intended wife to leave her at his death £1000, and adjudged not to be extinguished by the inter-marriage; and so is *Pridgeon v. Pridgeon*, 1 Chan. Cases, 117; 2 Mod. 171. A contract under seal may be proved to be annulled by the conduct of the parties and other circumstantial evidence.

CH. 122.
Art. 2.

*Cringan & al.
v. Nicolson's
exr.*, 1 Hen.
& M. 428.

§ 11. Covenants and contracts annulled by the legislature. And it must be understood by the parties when they enter into them, that they must become void if the legislature forbid them to be executed; but if part only be made unlawful, the residue shall be performed. So the contract may be only suspended as in the cases of embargoes, above stated, the impeding laws being temporary in their nature. So for a portion of time, as when the dean and chapter of St. Paul's were under contract to make a lease for ninety-nine years, and to renew &c., and the act of 13 & 14 of Eliz. was passed, forbidding such persons to make leases for above forty years, chancery decreed they should make a lease for that period. In the House of Lords confirmed.

8 Mod. 51,
Winnington
Briscoe.—
Pow. on Con.
445.—Cases
in Chan. 66,
cited 2 Pow.
on Con. 31,
33, Dr. Bil-
lesworth v.
Dean and
Chapter of
St. Paul's.

§ 12. So a man's contract in some cases may be discharged by the act of God. In this respect there is no difference between *assumpsit* and covenant; "for an *assumpsit* is a covenant by parol," "and a covenant is an *assumpsit* by deed."

And if by such act a covenant cannot be performed according to the words, it shall be according to the intent, and not be discharged. As where the lessor covenanted in his lease for twenty-one years, after that term to make to the lessee and his assigns a further lease for twenty-one years, the lessee died in the first term, and held, the executor of the executrix of the lessee was entitled to the new lease, though by the act of God it could not be to the lessee and his assigns according to the words; for the substance of the agreement was, that the estate should be made; and especially when the lease was limited to be made at a future day, the parties were aware that death was probable, and the lessee might die before the day, and it shall be presumed the intention of both parties was, that the lease should be made, though the lessee should die before the day.

Plow. 284,
Chapman v.
Dalton.

Modern cases do not seem to allow death, or other act of God to put an end to the special contract &c., as *Beatson v. Shark*, as stated Ch. 103, a. 3, and *Shubrick v. Salmond*, Ch. 103, a. 1; and *Cutter v. Powell*, Ch. 57, a. 3; *Laughter's case*, Ch. 101, a. 5; Ch. 117, a. 2. The old law seems to be, that the act of God rendering the performance of a contract impossible, excuses the non-performance, and in *Laugh-*

CH. 122. ter's case the obligor had his election to perform the one or the other part of the condition to save the penalty of the bond; and on this account, among other things, the contract was viewed as rescinded. "And when a bargain became impossible by the act of God, it is as if it were never made, or there had been no bargain at all." As if A, tenant for life, sell B 100 trees for £100, to be cut on a certain day, and before the day A dies, and thereby there is an end of his interest in the trees, and the bargain becomes impossible by the act of God, and not by any fault in B, A's executors shall not have the money, for B has not *quid pro quo*. But if A engaged in all events that B should have two years to cut the trees, and B cut fifty of them, and then A dies before the two years expired, his executors shall not have all the money; but a *quantum meruit* against B for the trees he cut not paid for, from the nature and justice of the thing; for B ought not to receive the property of A without paying for it, for "where a bargain becomes impossible by the act of God, it is as if there were no bargain at all;" "and therefore, the price here must be set a reasonable value." "So B has his action against the executors of A for any damages he has sustained by not enjoying the benefit of the contract." *Gilb. Cases*, 307. In this case the special contract being rendered impossible, or rescinded by the act of God, justice is done as it would have been if there had been no contract at all.

In all these cases and many more, the first consideration of the parties must be, whether the contract in question is suspended or not, dissolved or not, and if in part, to what extent; and whether the matter can be pleaded in discharge of the deed, or only in discharge of the damages accrued in virtue of it.

7 D. & E. 181,
Giles v. Edwards.

Where some act is to be done by each party under a special agreement, and the deft. by his neglect prevents the plt. from carrying the contract into execution, the plt. may in an action for money had and received, recover back any money he had paid under it:—was a special agreement as to the sale of wood, cited 5 East, 451, both parties did some acts on it, but such as did not materially affect their rights.

Salk. 574.—
Show. 46.—5
Com. D. 608.

§ 13. A covenant defeated by defeasance, see Defeasance, ante. If the plt. covenant he will not sue the deft. on a former covenant, this he may plead as a release, and it puts an end to such former covenant. But if several persons covenant with B, and he make a collateral covenant not to sue one of them, this does not put an end to a former covenant, but only discharges the one person. So a covenant not to sue for such a time, is no discharge; nor is a license to allow seven years to pay a debt. Hence it appears a covenant may be discharged, as to one of the covenantors, by a release, or cov-

enant to him, never to sue him, and still remain in force as to the others; not making his case worse. CH. 122.
Art. 2.

§ 14. A covenant when annulled, or the covenantee only barred his action on it. The cases on this intricate point of the law, evidently rest on two principles: 1. The plt's. covenant or deed, on which he sues, is annulled, discharged, avoided, or dissolved, and its obligatory force done away in several cases; as where it is torn in pieces, or burnt by consent, or where the covenantor's seal is designedly torn off by the covenantee, or where he releases the covenant by another deed, &c.: 2. The covenant in strict law is not so annihilated, because being a deed, by a maxim in law, it cannot be discharged or dissolved, annulled or avoided, but by deed, and still the covenantee is forever barred, estopped, or prevented, recovering upon it. And on what principle of law is the question to be decided, when the binding force of the deed remains; there is no answer to this question, but by making a distinction between this force and the damages claimed in virtue of it, and saying, though it remains, something has taken place that bars the damages. As where A covenants to convey to me land this day, and I instantly disseize him of it, and keep him out all the day, according to the above maxim, this my disseizin, an act in *pais*, cannot discharge or annul the covenant; still if I sue him for damages for not conveying, as I must if I sue at all, I am barred recovering them. And this is the real distinction in Blake's and other cases, and is carefully to be attended to in the pleading; and every bar to the action must be on one or the other of these principles. Yet some of the cases are so reported that it is impossible to see on which, or whether on either of them, or both. In *Lady Lanesborough v. Ockbott*, it is said, that the parties by acts in *pais waived the deeds*, but how could such acts waive deeds any more than dissolve them, or put an end to them?

§ 15. *How both parties must be put in statu quo on rescinding.* Hence it is a general rule, that one party cannot rescind a contract for the default of the other, unless both can be put in *statu quo*, as before the contract. This rule is clear; for where the parties make a special contract, they must settle their rights upon it, or lay it aside wholly; they cannot settle part on it and part without it, as if it never existed; therefore when the parties have proceeded so far on it as to have fixed in virtue of it, some of their rights growing out of it, these rights cannot be rescinded; thus the contract being in part executed, it cannot be rescinded.

As *assumpsit* for money had and received. Facts,—A agreed for £10 to lease a house to B; this A was to repair, and execute a lease in ten days; but B was to have immediate pos-

5 East, 549,
453, Hunt v.
Silk.

CH. 122.
Art. 2.



session, and to execute a counterpart to pay rent ; B took possession and paid the £10 immediately ; but A neglected to execute the lease and to make the repairs beyond the ten days ; yet B continued possession. Held, B could not, by quitting the house for A's default, rescind the contract, and recover back the £10 ; but could only sue for the breach of the contract so specially made, for the reason above. And here B had had an immediate possession of the premises under the special agreement ; and so executed it in part. Yet B several times required A to make the lease and repairs ; this not being done, B quitted, and gave notice he rescinded the agreement for A's default. But the court held, B was too late to do this.

8 Johns. R.
198, Van Ben-
thuysen v.
Craper.—2
Ch. Ca 5, Le-
gate v. Hock-
wood.—1
Esp.N. P. 184.

§ 16. Vendee may rescind, if the vendor fails to make assurance, when reasonably required to do it, and he loses his bargain, and the vendee is not bound to wait until the vendor is able to convey : 2. After his continued neglect and inability for six years subsequent to a request and refusal to convey, neither law nor equity will interfere to enforce the contract, but leave the vendee at his option to rescind &c. 2 Esp. N. P. 640. The principles of this case are the same in law and equity.

14 Mass. R.
266.

§ 17. One party alone cannot rescind a contract, especially if he do not perform, or tender performance on his part, of what he is to perform.

15 Mass. R.
319, Conner
v. Henderson.

§ 18. *Assumpsit*, alleging the deft. engaged to sell the plt. eighty-nine casks of lime of good quality, but delivered eighty-nine casks of lime of little value, not merchantable : third count for money had and received ; no warranty the lime was good, no evidence of fraud. On the third count held, if the plt. would rescind the contract, "it was necessary that he put the deft. in the same situation he was in before the delivery of the article." See *Kimball v. Cunningham*, Ch. 32, a. 4. If the lime was of no value, as proved, yet the plt. should have returned the casks to the deft. See 14 Johns. R. 453, Caswell's case ; 14 Johns. R. 363, *Ellis v. Haskins*.

15 Mass. R.
447, King v.
Dedham
Bank.

§ 19. *Nor can the legislature rescind, or vary a covenant or contract.* This was an action brought by the plt. against this bank, to recover the contents of several of its bills, payable at the Middletown Bank, at Middletown, on demand. The bills bore date August 20, 1816. After this the legislature passed an act (of 1816, ch. 91,) enacting that all banks, incorporated in this Commonwealth, are prohibited the issuing of any bill or note, check or draft, payable at any other place than at such bank ; unless, also, the same shall also be made payable at the bank issuing the same. The second section enacted, that "every incorporated bank which has issued or shall

issue any such bill, note, check, or draft, shall be liable to pay the same in specie, to the holder thereof, on demand at such bank, without a previous demand at the bank or place, where the same is on the face of such bill &c. made payable ;" on the refusal a certain penalty, &c. The plt. relying on this act demanded payment of his bills at the Dedham Bank, only where issued. Judgment against him, on the ground that an act of the legislature cannot alter the nature or legal effect of an existing contract, to the prejudice of either party, nor give it a judicial construction any way binding on the parties. As the court cited no constitutional article in this case, it seems to have relied on the general principles of our system of government. This statute, it will be observed, only attempted to make a note or bill payable, by the contract, at one bank, payable, by this statute, at another bank,—in fact only to vary the place of payment. See, also, as to impairing contracts by the State legislatures, the Constitution of the United States, a. 1, s. 10 ; and the ordinance of Congress, of July 13, 1787, second fundamental article ; and *Sturges v. Crowninshield*.

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§ 20. *How a minor can rescind his contract or covenant, and the effect.* *Badger v. Phinney*, admr., Ch. 171, a. 13, s. 17. In replevin for goods sold by the plt. to the def't's. intestate, a minor, on credit, and being sued for the price, rescinded his contract ; and the plt. then brought replevin for the goods themselves, and recovered them ; the effect of the minor's rescinding being to have the right of property in the goods in the plt., the vendor ;—this clearly in equity, and also in law ; for when this contract of sale, voidable on the minor's part, was avoided by him or his administrator, in court, it became a nullity *ab initio*, and no contract of sale existed, or could be claimed by the minor or his administrator, to protect the sale, under which the minor or his administrator must have claimed and defended the goods, if at all, though the plt., the vendor, was bound by this contract until so avoided, and when so avoided by the vendee the vendor had a right to say it was void *ab initio*, *secus* the vendee by his own act would keep the goods and price also. See reasons &c. on this subject, *Guardians*, &c. Ch. 32 ; *Parent and Child*, Ch. 51.

Badger v. Phinney, admr. 15
Mass. R. 359.

§ 21. Equity rescinds contracts on the ground of mistake, though no fraud or contrivance in the case. So on the ground of misapprehension, as if an executor assign a mortgage to the heir on the mistaken idea he is entitled to it. So an agreement to sell an estate, and purchase money is paid, and it turns out the estate is the vendee's, equity orders the purchase money to be repaid. See Ch. 225, a. 6, s. 37, *Lands-*

Ch. R. 81,
Turner v. Turner.—1
Ves. 126.—
New. on C.
432, 433, 334.
—1 Vern. 32,
Gee v. Spencer.—1 P. W.
727, *Cann v.*

Cann.—1 Atk. 400.—1 Ves. 400, *Cocking v. Pratt*.—2 Bro. C. C. 400, 420, *Fox v. Mac-*
rith.—Hall v. Noyes, 3 Bro. C. C. 483.

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down *v. Landsdown*, where a schoolmaster erroneously decided a title between two brothers, and one conveyed, deed rescinded, on the ground of being made by mistake. Husband released on a mistaken view of his case, his deed set aside in equity; but not in a case of a compromise of a doubtful right, not made by mistake, but by one aware of his chance in suit. So a party intending to sell property for its real value, but by mistake &c. it is clearly undervalued, equity relieves him by rescinding his contract &c., though no fraud or *suppressio veri*, and though ratified, if done in the dark; but if the purchaser is merely to give a certain price, and no stipulation expressed or implied, that he is not to have it for less than the value, if he know a circumstance, as a mine &c., enhancing the value, and the seller is ignorant of this, the contract is not affected, for here is no fraud or mistake, as the buyer is not bound from the nature of the contract to make the discovery. *Bingham v Bingham*, Ves. 126.

New. on C.
351, 356.

§ 22. Contract rescinded on the ground of actual fraud arising out of actual impositions. Here but little need be said, for most clearly such contracts are void or voidable; and the main difficulty is in getting at the evidence to prove the fraud and imposition, in order to set aside or rescind. Sundry cases of contracts rescinded in equity, Ch. 32, a. 13.

12 Johns. R.
190, *Tucker v. Woods*.—
11 Johns. R.
525, *Judson v. Bass*.

§ 23. If A contract to sell property to B, and misrepresent it, or is unable to give the title intended, B may put an end to the contract. As if there be a registered mortgage on the land not understood by the contractee, though the registry, in law, is constructive notice of the mortgage's existence. So if the seller will not convey in reasonable time. 8 Johns. R. 257, a. 2, s. 16; 1 Taun. 430.

2 Ph. Ev. 64,
65.—2 Burr.
1011.—2
Taun. 38.—
12 Johns. R.
451, *Dowdle v. Camp*.—13
Johns. R. 359.

§ 24. If the purchaser has paid a part of the purchase money, and the seller refuse to perform his part of the contract, the purchaser may elect to affirm it and sue on it, or to disaffirm it, *ab initio*, and sue for money had and received;—must disaffirm *in toto* or not at all; and if this cannot be done, as where the purchaser has had possession, he must sue on the contract; nor can he recover back the money he has paid, where the contract to sell land is by parol, as then there is no default on the seller's part; nor can the buyer recover back his money after refusing to proceed further, the other party being ready to perform.

CHAPTER CXXIII.

COVENANT, PLEAS IN IT ON SEVERAL HEADS.

ART. 1. *Departure.*

§ 1. It is a settled rule in this action, as in all others, that each following plea must fortify the preceding one, and not be a departure from it. And if the subsequent plea by the same party do not maintain and fortify his prior plea, there is a departure in his pleading which vitiates his plea. What is, or is not a departure, or what subsequent plea of plt. or deft. does or does not fortify and support his prior one, is usually a question depending on the circumstances of each case. Some few rules and cases may be useful on this head in relation to covenants, and from which some general principles may be extracted. A departure is a going off to new matter, and not following up the matter he before pleaded. As in covenant the deft. pleaded performance generally, and the plt. replied that the deft. did not do such an act &c., and the deft. rejoined that he offered to do it. The court held, this rejoinder was a departure from the deft's. plea; for to perform, and to offer to perform, are different acts; and to offer to perform did not maintain the plea, stating he did perform.

Forms of
declarations
in covenant,
2 Ch. on Pl.
241 to 283,
and a few
notes thereon.

Salk. 123.—
Co. Lit. 304.

§ 2. So when the deft. pleads a descent and rejoins a feoffment on condition, this is a departure. So if the deft. in his bar makes title at common law, and in his rejoinder maintains it by custom or statute, the rejoinder is a departure from the plea.

§ 3. Debt on bond to perform covenants. These were to make a fence when he cut down the wood. The deft. pleaded he did not cut any wood; the plt. replied, he cut two acres and did not fence the land. Rejoinder, the deft. made the fence, was adjudged to be a departure; to say he made the fence did not at all fortify his allegation, he did not cut any wood.

Dyer, 253 b.
—5 Com. D.
423.

§ 4. Debt on bond conditioned to perform covenants; plea, performance. The plt. assigned a breach in not paying; deft. rejoined that he was expelled; held, this was a departure. So is a rejoinder that he paid a part of the rent, and the residue of it in taxes. Debt on bond, one conditioned to perform covenants, one covenant was, that the deft. pay £12 a year for a messuage leased to him quarterly, the deft. plead-

1 Salk. 221
3 Wood's
Con 578

CH. 123.
Art. 1.



3 Salk. 123.
— Lev. 81,
83.

2 Lev. 67.

4 Bac. Abr,
124.

1 Vent. 121.
5 Com. D.
427.

2 Wils. 8, 9,
Long v. Jack-
son.

5 Com. D.
425.—Co.
Lit. 304.—4
D. & E. 504.
Salk. 199.—
3 Burr. 1271.
—1 W. Bl.
351.— Dougl.
764.—4 Mod.
71 —Dougl.
454, Eaton v.
Jaques.

ed he performed the covenants ; the plt. replied that the deft. did not pay £3 a quarter's rent ; the deft. rejoined that before the said £3 was due, the plt. expelled the deft. ; held to be a departure.

§ 5. So in covenant to serve as an apprentice, at common law, is stated in the declaration, a replication, the custom of London, is a departure.

§ 6. So the deft. pleaded he performed the covenants ; the replication stated a breach in not returning certain goods ; the deft. rejoined that he had no order to do it : this adjudged to be a departure. So in covenant, plea not damnified, rejoinder, ready to pay, is a departure ; for the allegation the deft. paid, is going off from the allegation the plt. was not damnified.

§ 7. But whenever the subsequent matter maintains and fortifies the prior matter of the same party, it is no departure. As in debt on bond conditioned to perform covenants ; the deft. pleaded performance ; the plt. replied the covenant was to account for all monies received, and that he received such a sum ; and the deft. rejoined he was robbed of that sum, this is no departure, but was in substance accounting.

§ 8. So in debt on bond conditioned to perform covenants of apprenticeship, and that the apprentice should not run away during his apprenticeship. Plea, the apprentice did not run away. Replication, that he was bound for seven years, and run away before the end of them. The rejoinder was, that he was bound only for five years ; this is no departure, but only an explanation or fortification of the bar. Held, on special demurrer, and judgment for the deft., for he cannot rejoin new matter in excuse ; he may to explain or fortify his bar.

§ 9. To claim an estate at common law and to reply by statute is a departure, and bad on a general demurrer. See *Imp. M. P.* 43.

§ 10. *Assignee &c.* As the assignee of a term is not answerable for any breaches of covenant before he becomes assignee, nor after he has assigned over, when sued, he may plead that before the breach was incurred he assigned all his right, interest, and estate in the thing demised to A, and he will not be liable, and he need not plead the lessor had notice of the assignment. But then it is clear, that the assignee may avail himself of this plea, he must assign over all his interest and estate ; and if he retain any part of it he is not discharged of his liability. Nor is it essential he plead the entry and possession of the person to whom he assigns, though it is usual to do this. Hence, if he mortgage the term this is no such assignment, and the mortgagee who has not taken possession is not assignee, nor chargeable with rent &c. as such : the

mortgagee has the term merely as security, and the mortgagor may redeem it when he pleases; the whole or entire interest does not pass to the mortgagee, especially by our law, but the mortgagor retains a legal interest that he may sell, or which may be sold for his debts, whenever the term is worth more than the debt for which mortgaged. Nor is the mortgagee obliged to resort to the term; he may rely on his bond or note if he pleases. See also, 2 Ch. on Pl. 194.

CH. 123.

Art. 2.

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7 East, 340.

§ 11. A lessee for lives of a messuage, bound by his covenant to keep it in repair during the term, and at the end of it to deliver it up in repair by indenture, "granted and assigned all his estate, right, title, and interest therein to B and his executors, *habendum* to B and his executors for ninety-nine years, if *cestui que vie* should so long live, in as large, ample, and beneficial way as the grantor, his heirs, &c. held the same, paying a certain rent to the reversioner." At the expiration of ninety-nine years the reversioner sued B's executors for not yielding up the messuage in repair. It was stated in the pl't's declaration that all the interest and estate of A, lessee for life, was assigned to B and vested in him by assignment; the def't. in his plea denied this, and judgment for him; because there were no words assigning A's freehold of which he was seized; and because the conveyance of all one's estate, right, and title to one and his executors for years, cannot convey a freehold. See *Holford v. Hatch*, and *Palmer v. Edwards*, above.

1 East, 502,

Derby v.

Taylor.

§ 12. It is enough for the lessor in pleading to state that all the estate and interest of the lessee vested in the def't. by assignment, and need not state mean assignments.

3 Lev. 19.

#### ART. 2. *Declarations &c.*

§ 1. In declaring in this action on leases it is generally necessary to consider if the action be local or transitory. The general common law principle in this respect is affected in many cases by the statute of 32 H. VIII. c. 34, above cited. The general principle at common law is, that where the action is founded on privity of contract, it is transitory, and the venue need not be laid in the county in which the land is; but when the action is founded on privity of estate, it is local, and must be brought in the county in which the land is situated. The action is transitory when brought by the Lessor v. Lessee, Lessee v. Lessor, at common law, and by said statute when by the Assignee of the Reversion v. Lessee, and by Lessee v. Assignee of the Reversion. And it is local when it is brought by the Lessor v. Assignee of the Lessee; so by the Assignee of the Lessee v. Lessor; so when brought by Assignee of the Reversion v. Assignee of the Lessee, and by the Assignee of the Lessee v. Assignee of the Reversion. Only in

1 Saund. 237,  
Thursby v.  
Plant.—  
2 East, 676,  
Stevenson v.  
Lambard,  
cited 1 Ch. on  
Pl. 112.

**CH. 123.** the two first cases is the action on the privity of contract ; that is, between the original parties to it. In the third and fourth cases the lessor's contract is transferred by force of the said statute to his assignee of the reversion, and the action becomes transitory merely in virtue of the statute. But if local and brought in a wrong county, it is aided after verdict, by statute 16 & 17 Car. II. c. 8.

**Art. 2.**

7 D. & E.  
583, Mayor  
of London v.  
Cole.

1 Wils. 16,  
Thoresby v.  
Sparrow.—  
3 D. & E. 151.

4 East, 585,  
Smith v.  
Woodward.  
—4 Esp. R.  
337.

3 Lev. 348.—  
2 Ch. Pl. 193.

4 East, 477,  
Hall v. Case-  
nove.—See  
1 Ch. on Pl.  
349.  
1 Phil. Evid.  
485.

8 Lev. 348.

Cowp. 665,  
727, Price v.  
Fletcher.—1  
Saund. 233.

Cowp. 665,  
Dundas v. Ld.  
Weymouth ;  
cited 1 Ch.  
on Pl. 303.—  
1 Lev. 88,  
Elliot v.  
Blake.—Cro.  
J. 637.

§ 2. There must be *profert* and *oyer* as in other actions grounded on deeds. Nor can the court dispense with *oyer*, unless the deed be lost by time and accident, as in *Read v. Brookman*. No *profert* of a deed operating under the statute of uses. 1 Ch. on Pl. 349.

§ 3. But if the plt. make a *profert* of the deed, he must produce it ; for if he so declare, the court will not allow him to prove the deed destroyed or in the deft's. hands ; and see also *Ivers v. Hooper*, before stated ; but may amend &c. 1 Ch. on Pl. 350.

§ 4. Where a deed is written and dated on one day, it may be pleaded it was delivered on an after day, declaring &c. 2 Ch. on Pl. 193.

§ 5. In this action a declaration in covenant stated, that the deed was indented, made, and concluded on a day subsequent to that on which, on the face of it, it appeared to have been indented, made, and concluded ; and the court said this was as consistent as to allege it was sealed and delivered on a day subsequent ; that it is immaterial when indented or when made, and *made* only meant *written*. The only material word was, *concluded*, and a deed must be said to be concluded when it is delivered ; the time of delivery is the important time when it takes effect as a deed ; and several cases shew the delivery may be after the date.

§ 6. In declaring, in this action, on a deed, it is sufficient to declare according to the legal effect of it, and on so much only of it as will entitle the plt. to his action and to recover. Indeed, when it is very long, and consists of many provisions, the court will not allow the whole deed to be declared upon, because this swells the record too much, *Bristow v. Wright & al.*, and tends to prolixity, cited 1 Ch. on Pl. 303.

§ 7. In this action of covenant on a mortgage deed, the court thought it enough for the plt. to state in his declaration, that the deft. had, by a certain indenture, demised certain premises therein mentioned, (not specifying them,) subject among other things, to such a proviso ; then stating the substance of the covenant for the payment of the money, and breach for the non-payment ; and if the deed contain a proviso operating as a defeasance of the covenant, it belongs to the deft. to state the proviso if he means to rely upon it ; nor need the

declaration be positive, but it is sufficient to say, whereas it is witnessed &c. CH. 123.  
Art. 2.

§ 8. As to declaring on the seizin of husband and wife, see *Polyblank v. Hawkins*; and as to the manner of the plt's. assigning a breach of the covenant, see Ch. 120.

§ 9. This was an action of covenant brought against a lessee for years, on a lease by indenture: and the declaration stated the lease was executed by tenant for life; that the plt., the reversioner, then a minor, was named in it, but not signed by him, till after the death of the tenant for life. Held, the declaration was bad, on the ground it did not disclose sufficient matter to support the action; for it appeared the lease was void by the death of tenant for life, and the plt. admitted in the pleadings that he did not execute till the tenant for life was dead, so not until after there was an end of the lease; and the plt's. executing it afterwards could be no confirmation of it, so as to bind the lessee in an action of covenant; though perhaps he might have been estopped by this lease, by indenture, if the plt. himself had not disclosed the fact that he executed it after it had thus become void by the death of the tenant for life. The form of the declaration, pp. 86 to 89; pleas, 89 to 91. The deft's. eighth plea was that of bankruptcy, but it was not necessary to decide on this plea. On it was *Marsh v. Brace*, Cro. Jam. 334; *Wadham v. Marlowe*, 1 Sid. 447; *Barnard v. Godscall*, Cro. Jam. 309; *Mayor v. Steward*, 4 Burr. 2439, Ch. 121, a. 3; *Cotterall v. Hooke*, Dougl. 97. 1 D. & E. 86,  
96, Ludford  
v. Barber.—1  
Ch. on Pl.  
112.—1  
Saund. 241.  
—Cullen,  
392.

§ 10. If the plt. bring an action of covenant as assignee of the reversion, he must state in his declaration the assignment is by deed; but he need not shew the deed of assignment, where the thing may be assigned without deed, though the covenant ought to be by deed. See *Nokes v. Awder*, Ch. 105, a. 1; Ch. 106, a. 5. 3 Lev. 155.—  
Cro. El. 373,  
436.

§ 11. The action of covenant on the covenant must be according to the nature of the interest: if the covenantees have a joint-interest, all must join in the action, though the covenant be made with them, and each of them, so if the covenantor's interest and covenant be joint, all must be sued. And if A and B make a lease, the action of covenant must be against both on the covenant in law, when a breach is assigned that a stranger was seized, for the law raises the covenant according to their interest, and that is joint. See *Lilly v. Hedges*, Ch. 107, a. 1. 5 Co. 19.—5  
Com. D. 602.

§ 12. When the debt or demand (as often for rent) arises by 1 Ch. on Pl.  
345, 346, 362.

—7 D. & E. 774.—4 East, 200.—1 Ch. on Pl. 360, 361.—1 Stra. 230.—1 Saund. 291.—2 Ld. Raym. 1536.—7 D. & E. 638.—1 New R. 104.—1 Saund. 276, 291, 320.—Willes, 319.  
—6 East, 105.—2 Saund. 97.—Co. Lit. 49.—1 Ch. on Pl. 345, 351, 360, 361.

CH. 123. reason of some matter dehors the lease &c., stated in the declaration, the plt. must conclude it by saying, *per quod actio accrevit*; this is not usual when the action is solely on the deed or specialty; nor does the plt. state a consideration or inducement generally, but merely the contract. And if the lessor sue the lessee on bond or covenant for rent, it is not necessary to state the lessor's title, but the demise is stated; but if his title be stated, it will be considered an impertinent allegation, and surplusage; but when the lessor assigns or dies, his title must be stated by the plt. claiming under him, in order to show he had an assignable title. The delivery of the deed, though essential to its validity, need not be averred in pleading. The plt. must state his writing as under seal, except where he uses the technical words, *indenture, deed, or writing obligatory*, which imply a sealed instrument; the contract must be pleaded positively, and not by way of recital or whereas, and stated in the words of it, or according to its legal operation; and when the words, *bargain, sell, give, grant, release, confirm, &c.* are used in the deed, the party must rely on one of them, or such of them as have the same meaning. A consideration must be stated, in declaring in covenant, in two cases: 1. When it constitutes a condition precedent: 2. Where the conveyance pleaded operates under the statute of uses.

ART. 3. *Pleas by defts.*

1 Saund. 108. § 1. If the plt., in his declaration, assign several breaches, —5 Com. D. the deft. may demur to one and plead to the others. And if 605. a good breach of covenant be not assigned, it is bad on a general demurrer.

§ 2. If on *oyer* it appears that two others besides the plts. are named in the deed, though they did not seal, the deft. may demur. See *Vernon v. Jeffreys*, Ch. 107, a. 1.

2 Saund. 366, § 3. So if the declaration recite the deed according to a construction it will not bear, the deft. may crave *oyer* and demur; 2 Sacheverell *v. Froggatt*. for thereby the deed and plt's. construction are on the record, and may be compared by the court, and every part of the deed one with another, and from the whole collect the meaning of the parties, and the legal effect or operation of the whole deed. And see *Browning v. Wright*, debt, *oyer*.

5 Com D. § 4. In an action of covenant the deft. may plead before or 606. after *oyer* of the deed; but to debt on a bond for performance of covenants, he cannot plead without *oyer* of the bond.

§ 5. Generally the deft. cannot plead *non infregit conventionem*; for this plea is too general, and two negatives, to wit, and so he did not keep his covenant, and has not broken his covenant; this is not a good issue, but is aided after verdict. 4 Dall. 436, is informal.

1 Lev. 114, 183.—2 W. Bl. 1302.—8 D. & E. 278. —1 Sid. 289. —2 Selw. 458, *Pitt v. Russell*.

As to mutual, dependent, or concurrent covenants, see that **CH. 123.**  
head ; the manner of pleading ; and Cowp. 56 ; Dougl. 690 ; **Art. 3.**  
3 Wils. 387.

§ 6. In debt on bond for performance of covenants, the **Cro. El. 766,**  
deflt. cannot plead no covenants ; for then the bond is single ; **757.—5 Com.**  
and he is estopped to plead there is no such indenture. **D. 607.**

§ 7. The deflt. may plead in bar of this action of covenant, **5 Com. D.**  
an award made after the covenant is broken ; for when the **607.**  
covenant is broken the plt's. right is to damages, and these  
may be discharged by accord and satisfaction, as above, Ch.  
121, a. 2, s. 10, or by an award ; though if a party in a cov-  
enant bind himself to refer to arbitration, it is no plea to say  
he refused to refer. See *Thompson v. Charnock*, debt on con-  
tracts generally.

§ 8. But outlawry is no plea where the damages are uncer- **5 Com. D.**  
tain, as for not repairing, for the thing is not forfeited in such **607.**  
case, but is where certain, as for rent, and then outlawry is a  
good plea. *Lutw. 1513.* How averred, 7 East, 50. **1 East, 634.**

§ 9. If covenant be brought for non-payment of rent, the **1 Lev. 99,**  
deflt. cannot plead the plt's. release of all demands, at a day **Henn v.**  
before the rent sued for, becomes due. **Hanson.**

§ 10. Where the plt. secures an annuity by bond, and also **Dougl. 97,**  
by covenant, though the bond be forfeited, before a discharge **Cotteral v.**  
under the insolvent act (16 G. III. c. 3,) yet if the plt. sue the **Hooker.—7D.**  
covenant, the covenantor cannot plead the insolvency in bar of **& E. 306,**  
the action brought for payments becoming due after the dis- **Marks v. Up-**  
charge, nor does 34 G. III. c. 69, discharge an insolvent enti- **ton.**  
titled to the benefits of that act, from the payment of the ar-  
rears of an annuity becoming due after his discharge on a  
covenant made before that act.

§ 11. If there be a bond for performance of covenants, **Dyer, 57.**  
and they are broken, and the plt. sue the bond, the plea, a  
release of all covenants, is bad, for by the breach of the cov-  
enants the bond is forfeited before. As to a release or dis-  
charge without deed, see *Rogers v. Payne*, Ch. 119, a. 2 ;  
Ch. 121, a. 3.

§ 12. So the deflt. may plead in bar of this action a de- **5 Com. D.**  
feasance of the covenant ; so a subsequent covenant which **608.—Salk.**  
discharges a former one, as one never to sue the covenantor ; **574—Sho. 46.**  
and in all cases where the defeasance is absolute and per-  
petual, it amounts to a release, and may be pleaded in bar  
as such.

§ 13. If several men covenant, and the covenantee makes **Salk. 575,**  
a collateral covenant with one of them, that he shall not be **Tracy v. Ky-**  
sued, no other of them can plead this covenant in bar, as it **naston.—1Ld.**  
does not amount to a discharge of the prior covenant ; for this **Raym. 688.**  
after covenant with one of them is only for his benefit, and not **Salk. 537.**

CH. 123. for the advantage of the others. So a covenant not to ~~see~~  
 Art. 3. the covenantor himself, for such a time, is no discharge of the  
 ~~~~~ prior covenant: and on the same principle is a license for so  
 many years.

2 Vent. 218. § 14. So if A covenant to pay B \$1000 a year, so long as
 he and his wife live separate, and B afterwards covenants to
 indemnify A as to this sum so long as he and his wife cohabit,
 this is no bar to the action on the first covenant; but A must
 seek his remedy by an action on the after covenant if he be su-
 ed on the first. In this case the two covenants respect different
 portions of time, and the damages on one are no measure of
 the damages on the other.

1 Balk. 138. § 15. If the plt. assign several breaches of the covenant,
 the deft. may plead to each.

3 Med. 296, Harrison v. Hayward. § 16. If the covenant be to do an act on request, and the
 plt. states a request, it is no plea to say the deft. was ready to
 do the act; for in such case the act is to be done when the
 plt. requests it.

1 Bos. & P. 466, Scudamore v. Stratton. § 17. It seems now to be a settled rule, that performance of
 covenants pleaded otherwise than in the terms of the covenant,
 is bad, even on a general demurrer; that is, the performance
 pleaded must not differ not only in words but in sense and sub-
 stance from the covenant, or the legal effect of it.

Gower v. Hunt, Bull. N. P. 181. § 18. Set-off is a good plea in certain cases. This was an
 action of covenant on an indenture for non-payment of rent;
 the deft. pleaded *non est factum*, and gave notice of set-off.
 Held, this was admissible evidence on this issue, for the gen-
 eral issue mentioned in 2 Geo. II c. 22, must be understood
 to mean any general issue; and *non est factum* is a general
 issue.

Cowp. 66, Howlet v. Strickland. § 19. But in a set-off it is a general rule that unliquidated
 damages arising from the breach of other covenants to be per-
 formed by the plt. cannot be pleaded by way of set-off. And
 see Wigall v. Waters, 6 D. & E. 488; and Ch. 117, a. 1. This
 branch of the law is largely considered in debt, head Set-off.

10 Johns. R. 400, Rogers v. Burk. § 20. *Replication bad in traversing the time—tender by
 the deft. &c. &c.* Action of covenant on a contract by which
 the deft. agreed to put up and cover the frame of a house for
 the plt. on or before October 1, the plt. to find materials.
 Plea, he put up the frame &c. on or before October 1, viz:
 June 1, and was ready and tendered and offered the plt. to
 enclose the same &c., but the plt. did not furnish the neces-
 sary materials. The plt. replied that he did furnish the ma-
 terials &c., and performed all things on his part &c. [repea-
 ting what he before stated in his declaration,] yet the deft. at
 the time and place stated in his plea did not put up the frame
 &c., nor did he tender or offer to enclose &c. Special de-

murrer to this replication, and adjudged bad : 1. For traversing the time and place stated in the plea,—immaterial : 2. Making averments of performance before averred in his declaration, unnecessarily swelling the record : 3. Putting in issue several distinct matters of fact : 4. The replication should have been confined to a traverse of the allegation of performance by the deft. The special demurrer pointed out the several distinct matters &c. and other defects in the replication.

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Art. 1.

CHAPTER CXXIV.

COVENANT, VOUCHER.

ART. 1. *General principles.*

§ 1. In our common recoveries, as above stated, (which have become very rare,) we follow the English practice. We vouch him who has covenanted to warrant and to defend the land, in order to have a judgment and recovery over in value against him, but in no other case. In other cases if our covenants to warrant and defend the estate be broken, the only remedy sought is in an action of covenant broken to recover a satisfaction for the breach of covenant in damages. Then no voucher is necessary in order to have against the covenantor such judgment over in value. And as his covenant to warrant and defend the granted premises to the purchaser, his heirs, and assigns generally or specially, must be broken by his or their being evicted by elder and better title contrary to his covenant, an action for damages must lie of course, which it is conceived cannot be lost or taken away, by omitting to vouch the covenantor, his heirs, executors, or administrators. Voucher and notice then is, in our practice, a matter of discretion and convenience, and will generally be reasonable, though the law does not strictly require it. Often it may strengthen the defence, as this covenantor in case of a general warranty is entitled to retain the title-deeds, some of the most essential means of defence may be solely in his possession. He may know more about the title than the deft. called on to give up the estate. And if the covenantor has the means of defending the granted premises against the demandant, he ought to have the earliest opportunity to make use of

CH. 124. those means to prevent their being recovered from the warrantee, or his heirs or assigns, though they may not be bound to vouch him in such a manner, as if they do not vouch they shall lose their remedy for damages against him or those who represent him.

F. N. B. 312. § 2. In this author it is stated, that if the warrantee be impleaded and do not vouch the warrantor, and lose the land, he shall not afterwards have a writ of *warrantia chartæ* against him, but he may have it before he is impleaded, and bind the lands the warrantor has at the date of the writ, but cannot have his recompense till evicted. But voucher binds only those lands he has at the time the voucher is made, and such lands as he had aliened before are not bound; but by our law, as before stated, he cannot have covenant of warranty broken for damages till evicted by suit or entry.

§ 3. The form of our voucher, warrant, and notice to the warrantor to appear, if he see fit, and take upon him the defence of the suit, leave it optional with him to appear or not. Voucher on this covenant of warranty can only be when the tenant of the land is sued in order to recover it from him, for then only can he call on his warrantor to defend it. The deft's. voucher is in form by leave of the court, and ought to be the first term to prevent delay. When the tenant of the land warranted is sued, and vouches the warrantor or his representatives to warranty, he must state generally the grounds of his voucher, as that A, the warrantor, by his deed of such a date duly executed, acknowledged, and registered, and in court to be produced, for a valuable consideration therein expressed, did convey with warranty the demanded premises (or such part as his warranty includes) to one B, his heirs and assigns (as the case may be,) and the said B afterwards by his deed &c. conveyed the same demanded premises to the deft., and his heirs and assigns, by virtue whereof he now holds the same &c. After such voucher the action must be continued to notify the warrantor, or if dead, his representatives, to appear and defend, if they see fit, by a warrant or summons under the seal of the court, witnessed by the chief justice and attested by the clerk. This warrant may be to the sheriff or his deputy to notify the party, or to the party directly, to be served on him by the proper officer fourteen days before the court in either case. Divers tenants, deft's. in the same action, may be joined in one warrant or notice. And if executors be called upon to warrant, the summons may be directed to them, describing them and their capacity as executors of A, &c. stating the action brought by such plts. against such defts. at a court holden &c., demanding such lands, bounded &c., and the continuance of the ac-

tion to such a court, that any of the defts. might vouch in their warrantors or aid, and D, E, F, G, H, (defts.) severally say, the said A in his life time by his deed, dated &c., conveyed 100 acres of the land before described to one J. P., his heirs and assigns with warranty, and he by his deed afterwards conveyed said 100 acres to said D, (one deft.) and his heirs, by virtue whereof he now holds said 100 acres; and the said A by his other deed of bargain and sale, dated &c., conveyed fifty acres more of said tracts of land to the said E, (another deft.,) his heirs and assigns, with warranty, by virtue whereof he now holds said fifty acres; and the said A by his other deed &c.; so as to the other defts.; and you the said executors are hereby notified to appear at the said last mentioned court to defend the said suit &c.—served by the sheriff or his deputy.

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Art. 2.



§ 4. When the warrantor or his representative appears in court, and is admitted, it may be alone to take upon him the defence of the action in the place of the tenant, and after defence made to plead the deft. or tenant did not disseize the demandant &c., or jointly with the deft., and after defence made, they may plead that the deft. is not guilty, did not disseize &c., as the case may be. They thus joined in the defence in *Thatcher v. Omans or Gill*; though it is said in *Hobart*, 47, 163, that when the vouchee enters into warranty, the deft. is out of court. And so Blackstone says, if the vouchee (one who has warranted the title and is called in to answer the action) appears, he is made deft. instead of the voucher; but if the vouchee be defaulted, judgment is had against the original deft., and he in England, recovers in value against the vouchee; but there in *assises* no voucher was allowed; but tenant might sue out his *warrantia chartæ* against the warrantor to compel him to assist him with a good plea or defence, or else to render damages, and the value of the land if recovered against the tenant. If the warrantor be in court, he may immediately enter into warranty and without summons, as was done in the case of *Tenny & ux. v. Sawyer & ux.*

Story's
Pleadings,
333, 334.—
3 Bl. Com.
299.

Booth on
Real Actions,
43.

§ 5. The value recovered over against the warrantor was the value of the land warranted at the time of the purchase and warranty. 1 Inst. 101, 393; 4 Dall. 442; 3 Cain. 112; 4 Johns. R. 21.

Several defts. are joined, and plead as above, in our practice, on the principles explained in *Coffin & al. v. Hodge & al.* in a subsequent chapter.

ART. 2. *On what covenant vouchers lie.* As every person vouched to warranty in virtue of his covenant, or of a covenant by law devolved upon him, must be vouched on such covenant, there of course can be no voucher where there is

CH. 124. no covenant, and not always where a covenant does exist ;

Art. 2. though a covenant of warranty passes with the estate, it is not every tenant of it who can vouch or every covenantor who can be vouched. One vouched in may vouch over, and if one came in as vouchee, as tenant by the curtesy, he may have aid of him in a reversion. And a warranty may be on release with warranty to the tenant of the land. But warranties only regard freeholds and inheritances ; covenants only attach to lesser estates.

Hob 20, 28,
Roll v. Os-
borne.

First. If the estate be changed and the warrantee be in of another estate, there is no voucher ; for the estate must remain in the same privy, or must be made the same in representation, that it was when the warranty was created, and if altered before voucher or warrant of charters brought, neither lies. Therefore, if husband and wife be joint tenants, and a release is made to them with warranty, and then he alone makes a feoffment over with warranty, and is thereupon vouched alone, he cannot vouch over, for by his sole grant he changed the estate. But in such cases the vouchee must show how the estate is changed, and as was done in *Roll v. Osborne*, and he must also shew what estate the party vouching on the covenant of warranty has, as for life &c., if he claim a larger estate as in fee &c., otherwise the vouchee will be viewed as admitting the estate the voucher, however large, claims. But if this special estate in the tenant be shewn by the vouchee by protestation, not denied, it will be sufficient. The warranty is against all evictions by elder title, by entry, or by action, and so it was decided in the case of *Ingalls v. Corlis*, above stated. A mere *pernor* of the profits cannot vouch, his interest is too small.

5 Co. 6.—
Co. Lit.
166 a, 174,
387.

Hob. 126.—
11 Co. 62.

3 Wils. 28.—
3 Wood's
Con. 37.—
Co. Lit. 117.
—2 Cro. 370.
—Hob. 27.—
Law of Uses,
103, 298.—
Co. Lit. 393.
—2 Saund.
180 —Booth
on Real Ac-
tions, 165.—
Co. L. 101.

Second. No one in the *post*, as tenant by the curtesy, can vouch to warranty, for the covenant to warrant is only to the grantee, his heirs, and assigns, and one in the *post*, as tenant by the curtesy, a recoverer in a common recovery, one in by the statute of uses &c. is neither, but above that estate to which this warranty is annexed. And if one come under the estate, and not in the *per* by the grantee to whom warranted, he cannot have benefit of the warranty, but such persons may *rebut*. "By way of *rebutter* every stranger may plead a warranty if he has the deed by way of *que estate*." And a voucher can be used only when a freehold or inheritance in lands is demanded.

2 Saund. 180. Third. If a recovery once be had on a covenant of warranty, in voucher, in *warrantia chartæ*, or covenant in lands of equal value, or an equivalent in damages, the warranty is executed, and there can be no further voucher or process upon it. So a judgment to recover in value on a warranty

excludes any after voucher thereon, for the same land, action or process; and the effect must be the same, if there be a judgment for the damages in covenant broken, for by such judgment the damages are *res adjudicata*, and there can never be but one satisfaction for the breach of the same covenant or contract totally, though there may be more by parcels.

Fourth. If one make a grant to A by the word *dedi*, which implies a warranty, his assignee cannot vouch; but if one lease to A for years by the word *concessi* or *demisi*, which implies a covenant, and he assign to B, and he be evicted, he shall have an action of covenant. So if A sell to B, his heirs and assigns with warranty, and B sell to C, he, as assignee, shall vouch A, whether B make a warranty to C or not.

Fifth. Voucher lies in real actions for the recovery of lands, but not in *assise*, or in writs in the nature of *assise*; nor in partition, nor in dower against the heir, nor in *quod permittat*, or writs of intrusion. In Comyns it is said, "voucher lies in all real actions for recovery of lands, except *assise*, but this must be understood with the exception as to speedy remedies, different estates, debts. in the post &c., as above stated; but does of the heir in dower against another *baron* and *feme*."

ART. 3. Counter plea of voucher.

§ 1. At the common law if the tenant vouched, the plt. or demandant might counter plead, and shew the voucher ought not to be allowed, as that the vouchee or any of his ancestors had nothing in the demanded premises; or that there was no such person as the vouchee, or that he was dead. And as the deft's voucher tends very much to delay, when the vouchee is not in court ready to enter into warranty, the law allows the demandant to counter plead the voucher, and to shew any substantial matter why he that vouches ought not to be allowed such voucher. Therefore, if the vouchee be in court, and immediately enter into warranty, the demandant cannot counter plead, for then the voucher occasions no delay.

§ 2. Counter pleas in what cases: 1. At common law, as before stated: 2. By statute: 3. To the person of the voucher: 4. To the person of the vouchee: and 5. By the demandant and vouchee. But at common law the demandant could not plead any plea which was a counter plea of the warranty, then the act of 3 Ed. I. c. 39, was passed, which gives two kinds of counter pleas: 1. Those applicable only to writs of possession, as *intrusion*, *mort d'ancestor*, &c.: 2. Those applicable both to writs of possession and to writs of right, as writs of right, patent, *formedon*, &c. and other writs of right in their nature. As to possession and right it may be said, that every real action is possessory, viz: of the demandant's own possession or seizin, or *ancestral*, viz: the possession or seizin of

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Art. 3.

Spencer's
case, 5 Co.
17.—3 Co.
63.

2 Roll. 745.
2 Mod. 21.—
Booth, 42.—
6 Com. D.
437.—Booth,
48, 49, 50.

6 Com. D.
423.—Rast.
Ent. 687.—
Jones, 412.—
2 Inst. 245,
246.—6
Cruise, 339.

2 Inst. 243.—
Booth, 50.

21 Ed. IV.
54.—40 Ed.
III. 37.—
Booth, 50, 51.

6 Co. 3 to 6,
Marshall's
case.—3 Bl.
Com. 300.—
4 D. & E. 75.
—13 Ed. I.
c. 46.—6 Ed.
I. c. 2.

CH. 124. his ancestor. And when a minor sues on his own possession,
 Art. 3. though he has the land by descent, and though his ancestor's
 covenant of warranty is pleaded by the deft., the parol shall not
 demur for nonage ; for when his ancestor dies seized and the
 land comes to the minor plt., and he enters and takes the profits,
 the loss of possession is a loss to him, and so not to be delay-
 ed. But when only the bare right descends to him, there is
 no such prejudice, and this demurrer is for his benefit to en-
 able him to know his title, and so time is given where delay
 will not prejudice him. And *ancestrel* actions are of two
 sorts : 1. Ancestrel rightful, because nothing descends from
 ancestor but a bare right : 2. Ancestrel possessory, where the
 ancestor dies in possession and the land itself descends. When
 a bare right in fee simple descends from any ancestor once in
 possession to a minor, and he brings an action ancestrel, the
 tenant without any plea pleaded, may pray that the parol may
 demur, as in a writ of right, as heir to his ancestor laying the
 esplees in him. So in *formedon in reverter* as heir to the do-
 nor, for here he demands fee simple of his ancestor's seizin
 and must lay the esplees in the donor. But in *formedon* in
 remainder, though he demands a fee simple, yet as his ances-
 tor to whom he is heir was never seized or took any esplees,
 the plt. must lay the esplees in the particular tenant, the deft.
 cannot without plea, pray that the parol may demur, as the
 remainder never was in any of his ancestors' possession, and
 the plt. will be the first in whom it will vest, and when the
 deft. vouches one as heir within age, he may pray that the
 parol demur on the same principle in England.

Ras. Ent.
 687 —2 Inst.
 153, 239 to
 243.—3 Ed.
 I. c. 39.—6
 Com. D. 423.

Booth, 52.—
 Dyer, 341.—
 50 Ed. III. 2.

14 H. VI. 7.
 —12 H. VII.
 9.—Ras. Ent.
 687.

§ 3. The most common counter plea, as that neither the
 vouchee nor his ancestor ever had any seizin of the demanded
 premises in fee &c. ; but there are also other counter pleas.
 By Westminster first, voucher in writs of entry is limited to
 the degrees, but in such writs in the post it may be at large.

§ 4. It is a good counter plea to say that the vouchee is
 joint-tenant with others not named, or that he never had any
 thing but as joint-tenant. And if there be any issue on the
 counter plea it is not abated by the death of the vouchee, for
 as yet he is no party to the record. If the vouchee be return-
 ed dead before appearance, the deft. may vouch a stranger,
 without shewing cause where the voucher is counter pleaded,
 but where admitted and the vouchee be returned deceased, his
 heir only can be vouched ; for by the voucher and admission
 the vouchee is agreed on as the warrantor, and then his war-
 ranty must be pursued. When the voucher is allowed, the
 entry is that it stand ; if not allowed, that the voucher be pre-
 cluded from having that voucher.

§ 5. So by the 3 Ed. I. c. 39, if the tenant vouch the de-

mandant may counterplead, that the deft. or his ancestor first entered after the death of him whose seizin the plt. claims; for if an estate begin by wrong there can be no good warranty annexed to it. A vouchee may enter into warranty, saving to himself his entry, action, condition, &c.; but if he enter generally, he admits the writ to be good, and cannot afterwards plead in abatement. CH. 124.
Art. 4.
2 Co. 73, 74.
—3 Co. 3.

§ 6. *Counterplea of warranty.* As the demandant may counterplead the voucher, so the vouchee may by the 3 Ed. I. 39, counterplead the warranty and shew he ought not to warrant the land. And so he may shew the voucher is in of another estate than the estate to which the warranty is annexed; so that the feoffment was made by him to the voucher and a stranger, and to his heir who is living, and not joined in the voucher; so that the vouchee never had any thing but by disseizin on whom the tenant re-entered. So the vouchee may plead that he is to warrant but a part of the estate. So after entering into the warranty generally, he may shew he is to warrant but a fee tail, or an estate for life. If on this plea the warranty be disallowed, judgment is immediately against the tenant and for the plt.; and if allowed on trial or demurrer, the judgment over also in value against the vouchee by the statute of Westminster 2, c. 6, in England, before which the tenant could have judgment against the vouchee only that he warrant the lands. Booth, 52.—
40 Ed. III. 14.
—44 Ed. III.
2.—9 H. VI.
50.—14 H.
VI. 36.
17 Ed. III.
74.
9 H. VII. 40.
—18 Ed. III.
40.
Ros. Ent.
380.
Booth, 53.—
2 Inst. 366.

§ 7. Voucher counterpleaded may be waived by the tenant. and after waiver he may plead in abatement or bar. So if he demur to a counterplea and it is adjudged against him in the same term. But if the demurrer be adjourned to another term, it is peremptory, and there shall be judgment against the tenant. This waiver may apply in our practice, but any delay after one continuance to summons is at the discretion of the court. 2 Inst. 243.—
22 H. VI. 40.
6 Com. D.
424.

ART. 4. *Vouchers and counterpleas limited in this State, &c.*

§ 1. The above, and many other cases of vouchers and counterpleas, are material to be understood in England, and most of them in our common recoveries, which may yet be suffered in this State, however rarely they may occur; but not many of these cases are of use in our common practice, because in this our vouchers and counterpleas are very much limited in these ways. If the deft. vouch at all, it is on our common covenant of warranty, in our deeds of conveyance; we have no deed of vouchers leading to endless delays as in England, detailed in Booth on Real Actions, pp. 54 to 62.

§ 2. If the vouchee be present in court, and immediately enter into warranty, there can be no counterplea or delay;

CH. 124. for whether the vouchee take upon him the defence of the
 Art. 4. suit alone, in the deft's. stead, or join with the deft. in the
 defence, the deft's. title only comes in question, as in either
 case the plea is, the deft. is not guilty, or did not disseize &c.
 The best way is, to join with the deft., as in *Thatcher v. Omans or Gill*.

§ 3. By our law, in common cases, or in all cases except in common recoveries, there is no judgment over in value. Therefore all the English proceedings, so many and intricate, leading to this judgment, after the summons to the vouchee to warrant, are out of the question; those proceedings are to bring in the vouchee, or so to place him as that finally the deft. may have judgment to recover over lands of equal value against him. But our law and practice (except in common recoveries) have no such object in view, but call on the vouchee at the deft's. request merely to help him plead and defend, but not to afford the deft. any effectual remedy against the vouchee; for as that is only in damages, which never can be ascertained on the voucher, the deft's., or tenant's, only effectual remedy against the vouchee, his warrantor, is his action of covenant broken, as between them alone, in which the contract of warranty is tried; and if found to be broken, the warrantee, now plt., has his satisfaction in damages, assessed by a jury on the principles stated in a former chapter.

Co. Lit. 102a.
 —6 Com. D.
 424.

§ 4. By our law and practice there is no compulsive process to enforce the vouchee's appearance. Even by the English law and practice the tenant must procure his appearance, otherwise there shall be judgment for the demandant against the tenant for failure of voucher. But this is after a tedious process, having mainly for its object the judgment over in value,—as summons to warranty, *alias* and *pluries*, *petit cape*, the *grand cape ad valentiam*, *alias* and *pluries grand cape*, and *sequatur sub suo periculo*. And after all these proceedings, which take up several years, where there are several vouchees, if the vouchee do not appear, there is judgment for the demandant against the deft. or tenant; and he has judgment to recover over in value against the vouchee. So if there the vouchee appear and then make default, a *petit cape ad valentiam* goes against him; and on a second default, judgment is against the tenant, and for him over against the vouchee. But our process stops at the summons to warrant; if on this the vouchee appears, he is allowed to join in the defence; if not, there is no penalty for his non-appearance, but the deft. is left to his only remedy against him, his action of covenant broken, for his satisfaction in pecuniary damages.

Co. Lit. 101,
 102.—6 Com.
 D. 424.

1 Mod. 339.

§ 5. Even in England a voucher is viewed "as an indulgence to the tenant, and a very great hardship to the demand-

ant." There it is allowed that the deft. may have the benefit of his warranty "without circuitry of action," "but as to the demandant it is dilatory;" there it is a kind of intermediate action, in which the voucher is plt., and the vouchee is deft. "It has all the qualities of an action,—the vouchee, as a deft., may plead, the voucher itself may abate, and until this voucher is determined, the original action is at a stay;" and it may be determined by the death of the vouchee, and in other ways. And if so ended the court there will not suffer the deft. to vouch again, unless he do it instantly, and for good cause shewn, so as to produce as little delay as possible. As where he vouched two, and the sheriff returned one dead, he was driven instantly to vouch anew, and he vouched the survivor, and the heir of the one deceased, and this was allowed; or in such case he may vouch the survivor alone.

CH. 124.
Art. 5.



4 Com. D.
282.

Now if in England, where the voucher thus answers the purpose of an action, and also aid to the deft. in his defence, any delay by the voucher is so justly and carefully guarded against, much more ought it to be guarded against in this State, where the voucher only answers the purpose of such aid, and not of the action; and for this reason, (among others,) our process to bring in the vouchee may well proceed no further than a summons to him to appear; and for like reasons it may be doubtful if the parol shall demur for the nonage of the vouchee, but in very special cases, but where not much delay will thereby be produced. As our voucher (except in common recoveries,) does not respect the value over in equivalent lands, another material difference results. In England the *warrantia charta* binds the lands of the warrantor from the date of the writ, and voucher from the time it is made. But in this State the voucher does not bind at all, any lands. In *gavelkind* the eldest son is vouched as heir to the warranty, and the rest in respect to the lands.

Co. Lit. 102.
—Hob. 23.—
F. N. B. 312.
—1 Inst. 376.
—5 Bac. Abr.
453.

ART. 5. *Material difference between voucher and rebutter.*

§ 1. Rebutter is to defend; voucher is to aid, also to recover in value for the loss. Though a *cestui que use* in the *post*, and not in the *per*, may *rebut* on a warranty annexed to the estate, and so take advantage of it, as having by the statute of uses the legal estate in possession transferred to his use, yet he cannot vouch, as he cannot recover in value, as he claims by the statute, and not on the covenant of warranty. Formerly it was held, the tenant could not *rebut* by warranty, without shewing how he was assignee, and how it extended to him; but lately it has been holden, that one possessing the land may *rebut* the plt., without shewing how he comes to the possession, for he may defend his possession, and bar the demandant, whose warranty ought to estop him.

Law. of Uses,
62.—3 Co.
58, case of
Lincoln Col-
lege.—4
Com. D. 290.
—Vaugh. 284,
385, 387.—
Cro. Car. 371.
—3 Co. 63.
—45 Ed. III.
18.—Co. Lit.
385.—F. N.
B. 311—38
Ed. III. 26.—
5 Bac. Abr.
453.

CH. 124 And on this ground a tenant by the *curtesy* may *rebut*, though
 Art. 5. being in the estate in the *post*, he cannot vouch. So the do-
 nee in tail, though in of another estate may rebut the demand-
 ant, but cannot vouch. So the assignee in possession may
 rebut by force of a warranty made to one and his heirs : so
 the feoffee, or donee in tail. But when Coke stated, that the as-
 signee by parol, might vouch, it is to be observed that was
 said before the statute of frauds was passed.

8 Co. 102,
 Syms' case.
 —5 Ed. II.
 78.—Co. Lit.
 373.—1 Mod.
 182.—4 H.
 VII. 18.

§ 2. If there be three sisters, co-heirs, and the warranty of
 their *cousin* made to the tenant, descend upon them, the ten-
 ant may rebut and bar them all, and so each one alone, on
 shewing the cousin's deed, though the three heirs claim the
 estate from their grandmother; and though objected the tenant
 must rebut, as he vouches, and he cannot vouch one only, as
 the warranty descends on all, so should not rebut against
 one alone, but only for a third part, as the demandant is not
 sole heir to the warranty; but notwithstanding this objection,
 the decision was, that the demandant, one of the three co-heirs,
 was barred all her interest in the land. This case is cited in
 Syms' case, and according to the decisions in both, if a war-
 ranty, lineal or collateral, descend on several co-heirs, each
 and all of them are rebutted and barred by it, claiming
 any interest in the land, though they claim under others than
 the warrantor, or the plt. claims all, and in a case too in which
 the demandant can be vouched but with others. This Eng-
 lish principle, as to rebutter or bar, applies in our practice,
 but not the English principle as it applies to voucher in a like
 case. As, for instance, in England A seized of three acres
 enfeoffed B of one, with warranty, and died seized of the
 other two, leaving two daughters his heirs, C and D; they
 made partition, and each had one acre; A's widow bought
 C's acre, and then sued B for her dower, and B vouched C
 and D as heirs of A his warrantor; C entered into the war-
 ranty as having nothing by descent; D pleaded the special
 matter, and urged, as the widow, the plt., had bought C's
 acre she should recover but a moiety in value against D, as
 the warranty descended on both. But the court held, that
 she should recover the whole value against D, who had by
 descent, "for when two heirs are vouched, and the one hath
 nothing, the other shall render the whole in value," though
 the warranty descend not on her alone.

8 Co. 108.—6
 Ed. III. 50.

§ 3. In this case it may be observed, that both daughters
 had lands by descent from A, their warranting ancestor, but
 as C, one of them, sold her acre before she was vouched, she
 was viewed as having nothing by descent, and D was held to
 answer the whole warranty, as far as her acre was assets; this
 was by the recovery over in value. But as by our law there is

no such recovery in value, two such heirs can be vouched only to aid in the defence, or be held to answer in damages in an action of covenant broken against both, in which judgment is against both, for two reasons : 1. It is a judgment on a contract or covenant descending on both : 2. Both received assets by descent from him making the lineal warranty ; and in such an action for damages can one be omitted in the judgment, by shewing, though she received assets she has parted with them ? It is clear she cannot. And see 3 & 4 W. & M. 14, by which the heir or devisee is liable, though he alien before sued, as stated in a former chapter (Assets) and by that act the heir and devisee may be joined. So by our statute.

CH. 124.
Art. 5.



§ 4. In this case it was decided, that if *baron* and *feme* sue me for lands of the wife, and I have a warranty of a collateral ancestor of the husband descended upon him, I may make use of it to rebut and bar the husband and wife. So the wife may lose her land by a collateral warranty descended on the husband. But *quære*, if longer than his life.

1 Inst. 365.—
6 Bac. Abr.
464.

§ 5. But generally by our law such action for damages shall be against the executors or administrators of the warrantor, because all his estate is assets in their hands to fulfil his contracts and covenants, including these of warranty. And no instance is found or recollected of an action of covenant of warranty being brought against the heirs, but on our statute below.

§ 6. And if any such contract or covenant be not suable within three years after the will proved or administration taken, by reason there has been no eviction or breach of contract in that time, and then the plt. must sue the heirs or devisees, by this statute, (his claim not being filed in the probate office) there is no such exemption of those who may have sold their assets ; but the estate of the deceased is "liable in the hands of the said heirs or devisees, or their heirs or assigns, to answer the said demand ;" that is, a demand against the deceased's estate on his "covenant, contract, or agreement," not suable till after the three years, but within them filed in the probate office ; and as to which if so filed the executors or administrators may retain assets, or have security from the heirs or devisees ; and if not so filed, then suable only as against the said heirs or devisees, but to be claimed in one year next after becoming due ; and they are not personally liable nor severally.

Mass. Act,
Feb. 14,
1789.—
Maine Act,
ch. 62, s. 27,
28.

§ 7. So that on the whole, the rebutter, bar, or estoppel, is a common law principle, and applies in this State as in England, so that no one can claim or recover an interest against his own warranty, or against one descended upon him, or upon him and others, where the principle of rebutter, a circuity of ac-

Co. Lit. 385.
—4 Com. D
283.

CH. 124.

Art. 6.



4 Com. D.
283.—Co.
Lit. 385.

8 Inst. Cl.
486, 490.

8 Co. 108.—
Statute of
Gloucester, 3.

tion, applies. So a disseizor, an abator, or intruder may rebut, though for want of privity he cannot vouch or have a *warrantia chartæ*. But one who claims above and not under the warranty, can neither vouch nor rebut; as if a feoffment be to two brothers with warranty to the eldest son and his heirs who dies without issue, the youngest cannot vouch or rebut; for he does not claim as heir, but under the feoffment in which there is no warranty to him. Nor can any one rebut when the warranty is void, as commencing by disseizin, or there is no freehold to which it can attach when made, or the heir's estate is not then divested and turned to a right.

§ 8. In this book there is a long special plea shewing the demandant was rebutted by a warranty descended upon him. The warranty was made by his father in a certain indenture.

ART. 6. *Statutes as to rebutter &c.*

§ 1. By statutes passed in England and adopted here, the heir of the warrantor is not rebutted or barred beyond the estate or assets he receives from the warrantor, in several cases. So that if one on whom a warranty descends sue for two acres, and only two acres descend from the warranting ancestor to her and her sister, the moiety or one acre descended to the demandant is a bar but to a moiety of the two acres she demands. "But if the moiety of the land which descends on the demandant be of equal value to the land in demand, she shall be barred of the whole; for a *lineal* warranty, when assets to the value of the land in demand descend, is as entire and full a bar as to the demandant, as a collateral warranty, descend the warranty in the one case or in the other, on the demandant only, or on her, or on any other."

§ 2. "And the statute of Gloucester, ch. 3, enacts, that if the warranty of the tenant by the curtesy be pleaded, the heir of the wife shall not be barred by the deed of his father from whom no inheritance descends &c.; and if inheritance doth descend from the part of the father, then he is barred of the value of the inheritance which descends to him; by force of which statute the collateral warranty, which without assets was a bar entirely to the whole by the common law, is now but a proportionable bar, having respect to the assets descended, and the lineal warranty and assets pleaded in *formedon* in descender is taken within the equity of the said act." And certain warranties descending on heirs are null and void by the 11 Henry VII. c. 20, and 3 & 4 of Anne, sect. 21, as before stated. By this last act all warranties made by tenants for life coming to those in remainder or reversion, are void; and all collateral warranties made by any ancestor having no estate of inheritance in possession in the land, are void as against the heir, as stated in a for-

mer chapter. In the several cases where a warranty is made void by statute, it cannot be used as a bar or as a rebutter, nor as a ground of voucher. But these statutes are restrictions of the common law no further than their provisions extend. CH. 124.
Art. 7.

§ 3. A rebutter is allowed to prevent a circuity of action, "and the reason why a warranty being a covenant real shall bar a future right, is for preventing a circuity of action which is not favoured in law; as he that makes the warranty would recover the land against the tenant, and he by force of the warranty would be entitled to have as much in value against the other person." Hence there is no rebutter where there is no circuity of action. This is when a recovery in the first action alone gives rise to the second, and second, when the two actions must be between the same parties. Actions on mutual independent bonds make not this circuity, nor if the heir in Borough English recover the land, and the tenant sues the heir at common law on the warranty; for these two suits are not between the same parties. The heir, the youngest son in Borough English, recovers the land of the tenant, and thence he has a cause of action on the warranty, but not against this heir, but against a third person, that is, the oldest son, the heir at common law. 6 Wood's
Con. 144,
cites Co. Lit.
446.

§ 4. Covenant broken by the plt. as assignee of one William Elliot, against the defts. as heirs of Josiah Gage deceased intestate in 1775, no administration on his estate; plt's. action omitted some of his heirs, and alleged the defts. had by descent from said Josiah Gage, their father, sufficient lands in fee simple in New Hampshire to satisfy the plt's. damages. Held, not assets in this state to charge the defts.; plt. nonsuit. 9 Mass. R.
396, Austin
v. Gage & al.

ART. 7. *A material difference between executions on vouchers, and damages in covenant broken on joint warranties.*

§ 1. As if two men sell lands with warranty the lands of both must be rendered in value, and if one die, the charge is on his heir and the survivor equally, for a joint lien that binds the land does not survive or lie only on the survivor, as where two, for themselves and their heirs, warrant lands to another and his heirs, the survivor alone shall not be vouched. Nor shall the sheriff deliver the lands of one or the other at his pleasure; "for in executions which concern the realty and charge the lands, the sheriff cannot do execution on the lands of one only. And so, if two are bound to warrant, and both die, both their heirs ought to be vouched, and they shall be equally charged." And it is no good objection to say that each one warrants the whole, or that either's land may be put in execution. Hence the survivor and the heir ought to be vouched together, and so of the heirs of both. But it is 3 Co. 14,
Herbert's
case.

CH. 124. otherwise in an action of covenant broken for damages ; for
 Art. 7. in this the action is founded on and must follow the covenant
 or contract, and is a personal action, as all actions for damages
 are ; and if the contract be joint the action must be so, and
 if joint only, it survives at common law ; and on execution
 against two or more, the officer may collect the damages of
 any one or more of them. But by Massachusetts act of Feb-
 ruary 26, 1800, covenants and contracts made by two or
 more jointly after that date, and one is deceased, the remedy
 is the same as if they were joint and several.

9 Co. 18, Bed-
 ingfield's
 case.

§ 2. *When may an heir vouched plead detention of charters.* It is a settled rule, that when, in an action of dower, the heir of the plt's. husband is vouched by the tenant, the heir can plead detention of charters, in bar of the action, only when he can state and shew he is ready to render her dower, if she will deliver to him his charters ; and this he cannot do : 1. If he have the land by purchase, for then the privity of the husband's heir is gone : 2. If the plt. have them by the heir's own delivery to her : 3. If he be not immediately vouched, as if the tenant in dower vouch A, and he vouch the heir : 4. If he come in as vouchee, and have no land in the county, or in a situation to be assigned as dower : 5. If he come in as tenant by receipt. In none of these cases can he plead he is ready.

See several of these matters of warranty and voucher, illustrated, Sul. Lect. 1 vol. 228. They seem to have been of *feudal* origin ; the lord's engagement that his vassel or tenant should hold the lands according to the grant, against all men, in return for his fealty and feudal services.

5 Cruise, 347,
 510.—Co. Lit.
 265.—3 Co.
 29.

§ 3. A release of errors from a common vouchee will not bar a writ of error. But a vouchee may release to a demandant, in a recovery. When the vouchee has entered into warranty, he becomes tenant to the demandant ; and he may release to him, the vouchee, though he has nothing in the land ; for then the vouchee may render the land to him, on account of the privity between them.

9 Johns. R.
 265.

§ 4. The tenant may vouch to warranty after a special imparlance.

3 Wentw. p.
 298 to end of
 the 3d vol. ;
 & 5th vol. p.
 1 to 145.

§ 5. In these volumes are numerous forms of declarations, pleas, replications, &c. in covenant, and in the index to covenant between p. 100 and p. 145, is an index of many references to forms found in other English authors, ancient and modern ; a few of them may here be specially noticed. As a declaration against two house-carpenters, for not finishing the plt's. house in the time agreed on, whereby he sustained certain losses, stated, 3 Wentw. 309, 312. Another as to the non-payment of seamen's wages. 312, 315. First plea,

non est factum ; second plea, set-off for goods sold and delivered, for money had and received, laid out and expended, 315 ; third plea, that it was agreed by said articles, if any one mutinied he forfeited his pay to the owner, 316 ; fourth plea, plt. dismissed in order to end mutiny, 316.

CH. 124.
Art. 7.

§ 6. Covenant declared on. Articles of separation, *feme* 3 Wentw. 318, 326.
plt. against her husband, for not paying an annuity allowed. Plea, oyer of the articles, protesting not become due ; only such sums were covenanted to be paid, and that these were paid, &c. Replication, not paid, and issue.

§ 7. Declaration for demurrage at the unloading ports, in each of three different voyages ; three breaches assigned. 3 Wentw. 341, 344.

Notes. Pleas in covenant—forms. Plea, performance, and explains the waste &c., 73, 74, 91. Plea, condition precedent not performed by the plt., 75. Plea, plt. expelled deft., 75. Plea, of *non infregit*, 76, 89. Pleas, as to £8 parcel, tender ; residue, a set-off, 76. Covenant against the assignee of the lessee ; plea thereto, deft. assigned over to A. B. before the rent become due, 78, 87. Plea, payment to the plt's. order ; issue thereon, 78, 79, 91. Plea, did repair &c., 79, 90. Plea, the plt. covenanted to put the premises in repair from the first, and to provide timber &c., and did not, whence they were not continued in repair, £0. Plea, discharge &c., 80, 81. Plea, deft. was ready to execute the lease had it been tendered to him, 84. Plea, deft. spent all the compost on the premises &c., 84. Plea, deft. surrendered his lease &c., and the plt. accepted it &c., 84. Plea, special covenant, and not against strangers, 85. Plea, rent spent in repairs, and set off for monies had and received, 85. For rent ; plea, expulsion by a stranger, J. M. ; expulsion by the plt. before the rent become due, 88. Replication, J. M. did not expel the deft ; second, plt. did not expel deft., 89. Plea, insolvent debtors' act, 92. Plea, defts. are not assignees, 92. Plea, did ditch &c. according to covenant, 97. Sundry references to pleas in various English books, 100 to 145, 5 Wentw. Am. Prec. 250 to 259. Story's Pl. 151 to 188.

CHAPTER, CXXV.

ESTATES.

ART. 1. *General principles.*

See Tacitus,
Cæsar,
Montesquieu,
Sull. Lects.
Dr. Rob-
ertson,
Hume,
Blackstone,
Lord Coke,
&c. &c.—1
Cruise, 6, 7,
17.

§ 1. The right of property, as by occupancy &c., has already been briefly considered. The object of this, and several following chapters, is to consider estates; that is, property modified and held in different ways, whence come estates in fee, for life, or years, by descent or purchase, estate in common or severalty, in possession or reversion, &c. The principles on which our several kinds of estates have been formed, and on which the quantity and quality of any estate are to be ascertained, may be traced not only to England but to ancient Germany; there the feudal principles took root, the effects of which we often perceive in this country. It appears that in the early ages of the Germans, they considered the lands as all belonging to the nation, or tribe, as has been generally the case in the infancy of nations, and as was the case at first in Virginia, and some other places in this country. An assembly of the freemen of Germany annually apportioned them out to individuals; and as the prince soon came to be considered as the representative of the nation, the lands were considered as held of him, and at the will of a superior. But when the Germans conquered England and other parts of the Roman empire, and it was found necessary to excite the individual to industry and exertion in cultivating and improving lands, to allow him a more permanent possession of the same tract than a year's allotment, a common opinion prevailed that estate should be more permanent; and feuds gradually came into use, that is, estates for the lives of the feoffees or donees, on certain conditions of doing feudal services. In order to give the feoffee or donee a life estate, and at the same time to point him out as the feudal tenant, or freeholder, bound to perform the feudal duties, the ceremony of livery of seizin of the land was adopted; this delivery of actual possession was essential to establish the relationship of lord and tenant, when deeds and writings were hardly known. Every one that had the freehold or greater estate had the feudal possession, and if he granted or leased his estate, for years or at will, still his possession was viewed as existing, and he bound to perform the feudal services attached to his estate. The possession of the lessee for years, or at will, was considered as that of the

lessor; the lessee being deemed only his bailiff or servant, and accountable to him for the profits of the estate; hence only the freeholder, to whom livery of seizin was made, was considered as being seized, and this lessee only as possessed, as there never was any livery of seizin made to him; he merely entered on the land, without any ceremony, and occupied for a time; and as livery of seizin was never made but of a freehold estate, that is, one for life, every estate whereof this livery was made came to be considered a freehold estate. We still use the words *seizin* and *possession* in this sense. It is held by some respectable authors that this infeudation was derived from the civil law. However this might be, it further appears, that in process of time these estates for life became estates of inheritance on certain feudal conditions; these estates of inheritance our ancestors adopted in America, but not those conditions. And anciently, at common law, all estates of inheritance were fee simple estates; and the true policy of the common law was overthrown by the statute *de donis*, 13 Ed. I., A. D. 1284. This statute, fully adopted in the colonies of Massachusetts and Plymouth, and in the Province of Maine, from their earliest settlement, introduced and established in them estates in *tail*, on the same principles on which they existed in England, and so in other English colonies.

CH. 125.
Art. 1.

6 Co. 40, 41,
Mildmay's
case, *de do-*
nis.

§ 2. "*Estate and interest* are collective words. As if there be A, tenant for life, remainder to B in tail, remainder to A in fee, and A grant *all his estate*, or *all his interest*, both his estates pass." In our statutes real and personal estate includes one's whole property.

Co. Lit.—6
Cruise, 192.
—14 Mass. R.
92.

§ 3. Estates in fee simple may be acquired in several ways, as by purchase, by long possession, or even by wrong or disseizin. And generally a party may plead that A was seized in fee without shewing how his estate began; but all particular estates, as estates tail, life estates, &c. must, in pleading, be specially derived out of the fee by grant or devise, and hence he who pleads them must shew how they began.

3 Wils. R.
66 to 73,
Johns v.
Whitley.—4
Com. D. 3.
—6 Cruise,
192.

§ 4. But the law prefers an estate by *right* to one by *wrong*; and therefore if H, tenant for life, disseize B, tenant for life, and he dies, the disseizin is purged, and H shall be deemed in of his life estate by right.

Co. Lit. 276.

§ 5. There are two requisites to make a fief or heritage, duration as to time, and immobility as to place; whatever wants either of these qualities is not, according to the Normans, a fief or heritage, or, according to us, is not a real estate; the consequence in both laws is, that it must be a personal estate or chattel; and chattels therefore are personal or real. A freehold, which alone is a real estate, and seems to

2 Bl. Com.
386.

CH. 125. answer to the fief of the Normans, is conveyed by livery of
Art. 1. seizin. Things *real* are fixed, and cannot be carried out of
 2 Burr. 910. their place. Things *personal* are goods &c., which may at-
 tend the owner's person wherever he goes. Where words
 may be supplied to effectuate the intentions of the devisor &c.,
 1 W. Bl. 300.

2 Fearn, 287, 288. § 6. The complete ownership of land involves two things :
 "the estate of the land, and the right to take the profits ; the
 former we call the *legal estate*, the latter the *use*." "The
use before the statute of uses was a mere trust, cognizable
 only in equity."

Co. Lit. 4.— § 7. Land includes all kind of soils, and not only the face
 4 Cruise, 40. of the earth, but all under it or over it, as structures &c. "A
 grant of land passeth houses built on it, for *cujus est solum*
ejus est usque ad celum."

Co. Lit. 6, § 8. Tenement includes every thing that can be holden of
 13, 14 —4 a permanent nature, not only lands and buildings, but offices,
 Cruise, 41 — rents, commons, &c. Hereditament, includes not only lands
 Co. Lit. 5.— and tenements, but whatever may be inherited, corporeal and
 4 Cruise, 41. incorporeal, real, personal, or mixed, and heir-looms, and what-
 ever goes to the heir.

Co. Lit. 19, § 9. Corporeal hereditaments are lands or things that may
 20.—2 Bl. be seen or handled by the body. Incorporeal hereditaments
 Com. 20. are things that cannot be seen or handled, and exist only in
 contemplation, and is a right issuing out of a thing corporeal,
 real or personal, or concerns, or is annexed to it ; they are
 the accidents which adhere in land, are supported by the
 substance, corporeal and tangible, and may belong or not to it
 without any visible alteration in it ; they are rents, annuities,
 pensions, franchises, commons, ways, offices, tithes, &c.

Co. Lit. 266. There is a right of property and a right of possession, and
 he that has both is said to have a double right. The disseisor
 has the first, the disseizor the second, and if the disseizee re-
 lease to him, he has both. Farm includes many things, 4
 Shep. T. 92. Cruise, 40.
 —3 Salk. 166.

§ 10. When *feoda* or feuds were at will, they were called
munera, when afterwards for life they were called *beneficia*,
 and hence the livings of the clergy are so called now ; and
 when afterwards they became hereditary they were called
feoda, and in the English law *fee simple*. Feuds were not
 hereditary in France till A. D. 947, and not in England till
 made so by William the Conqueror.

Co. Lit. 13. § 11. A man cannot create a new estate not known in law ;
 therefore, if he gives his lands to A and his heirs of the part
 of his mother, these words, *of the part of her mother*, are void,
 for the law knows no such estate. So of an estate to A and
 his heirs male, the word *male* shall be rejected and he have a
 fee simple.
 Co. Lit. 27.—
 Lit. sect. 31

§ 12. Where one claims an estate by agreement he must trace his title by deed; but otherwise where he claims it by act of law, as dower, estate by elegit, &c. for the law does not give him the deeds. So when a creditor takes an estate by execution, the law does not give him the title-deeds, and his estate is adverse to the debtor's. CH. 125.
Art. 2.
1 Mor. E.
160.

§ 13. *Condition performed.* A devise to A, his heirs and assigns, but in case he dies before twenty-one or marriage, and without issue, then over, if he attain twenty-one, the condition is performed,—word or read and. So before twenty-one and unmarried &c. 2 Stra. 1175,
Barker v.
Sureties.—
Lofft, 455.

ART. 2. *Title to estates.*

§ 1. This is the just cause of possessing that which is ours. 1 Inst. 345.
The first and lowest stage of a title is a mere naked possession or actual occupation of the estate without any apparent right; this may happen where there is a disseizin, an abatement, or intrusion. The mere naked possession the right owner may defeat whenever he pleases, but until he does do it, it is *prima facie* evidence of a legal title in the possessor, and it may in time ripen into a good title, and without such actual possession no title can be completely good. A court of law will adjudge a title good or bad, having no middle term for it. 2 Bl. Com.
196, 196. 5 Taun. R. 625. And when an officer sells property taken in execution the law implies he promises he does not know he is destitute of title to it. 657.

§ 2. The grades to a complete title are: 1. This bare naked or actual possession: 2. The apparent right of possession: 3. The actual right of possession: and 4. The mere right of property. 2 Bl. Com.
196 to 199. As if A by force or surprise get possession of my land, he has the bare possession; I have three essentials to title in me, the apparent right of possession, the actual right of possession, and the right or mere right of property; and having these I may lawfully enter upon the land. But if A die (at common law) and the land descend to his heir, the heir has in him the bare possession, and also the apparent right of possession, and I have left in me only the right of possession and the right of property. If I acquiesce in the possession of A and his heir thirty years, the heir has in him three requisites to a title, that is, the bare possession: 2. The apparent right of possession: and 3. The actual right of possession; and I have in me only the fourth requisite, the bare right of property, and can contest only the mere right. And if I acquiesce in the possession of A and his heir sixty years, (now forty years by our law) their title is complete; they have in them the four requisites to title, and I have no right at all; and the heir having the apparent right of possession, I cannot enter upon him, but must bring my action. P. 196. This ap-

CH. 125. parent right is when one appears to have it, and another can
 Art. 2. prove a better right of possession. 196. I may have only the
 mere right of property several ways. As if A disseize me of
 land and I contest the matter in a possessory action, and he
 gets judgment, he thereby gains the actual right of possession,
 or if, as before stated, I acquiesce thirty years. Or if tenant
 in tail alien the estate tail, his issue have only the mere right
 of property, as the tenant in tail had the right of possession
 and has transferred it. Pp. 198, 199. So if A disseize me of
 land and I die, and my heir acquiesces fifty years (now forty)
 from the time of the disseizin, he has only the mere right of
 property, and A or his heir, or grantee, has the actual right of
 possession, and my heir must declare in a writ of right.
 Hence A may have the possession, B the right of possession,
 and C the right of property. As where tenant in tail aliens to
 B in fee, and A disseize B, now A has the possession, B the
 right of possession, and C, the issue in tail, the right of pro-
 perty. B may recover the possession against A, and C against
 B on the right of property.

Mass. Act,
 July 4, 1786.

2 Bl. Com.
 199.

2 Bl. Com.
 311, 312.

§ 4. "In all well governed nations some notoriety of pos-
 session or seizin, has ever been held requisite in order to ac-
 quire or ascertain the property of lands." By the Roman law
 a man had not full dominion, unless he had both the right and
 corporeal possession, and this possession he could not have
 without actual seizin, or entry into the premises or part thereof
 in the name of the whole. The heir has not complete own-
 ership till he makes actual corporeal entry into the land, not
 the right but seizin makes the stock. This last clause is to
 be understood with some allowance, for if there be a tenant
 on the land who acknowledges he holds under him, or he puts
 a tenant upon the land, either is as valid as his actual entry
 would be. A contract to make a good title, means a title good
 in law and equity.

5 Taun. 625.

2 Bl. Com.
 105.

§ 5. *Allodial* property is property in its highest degree ;
 this is higher than feof or feud. It is a man's own land which
 he holds without owing any rent or service to any superior.
 Of this *allodial* property the owner has the direct absolute
 dominion, and if seized thereof absolutely in his own de-
 mesne. This *allodial* property, it is said no subject in Eng-
 land has, it being a received principle in law that all the lands
 in England are held mediately or immediately of the king.
 But is this otherwise held of him than as feudal lord ?

1 Vol. his
 Lect. 264, &c.
 Also the Ro-
 man estates
 were allodial,
 but their
 owners being
 oppressed by

Dr. Sullivan, professor at Dublin, described this *allodial*
 property thus : "One great and striking difference between
allodial and *feudal* lands consisted in this, that the former en-
 tered into commerce, they were saleable or otherwise alien-
 able at the will of the possessor, either by act executed and
 their feudal masters often got them converted into feudal estates, 209, 268, &c.

taking effect in his life time, or by will to take effect after his death. They are likewise pledges to the king for the good behaviour of the owner, and therefore, for his crimes forfeitable against him and his heirs. They were likewise security to his fellow subjects for the debts he might contract, and therefore by following the due course of the law, attachable and saleable to satisfy the demands of just creditors." This description agrees very accurately with a true description of our tenures in fee simple, though it has never been usual to consider our fee simple estates as *allodial*.

CH. 125.
Art. 3.

§ 6. No particular technical form is necessary to convey the testator's meaning; it must be collected from the scope of the whole will compared with its several parts. The court cannot make a will or interpret it by an arbitrary construction, nor take into their consideration any subsequent alteration of events.

2 Burr. 767,
771, Strong
v. Cummin.
—5 Burr.
2703.—6
Cruise, 167.

ART. 3. *Inheritances in fee.*

§ 1. Our estates of inheritance are: 1. Estates in fee simple, that is, to a man, his heirs, and assigns forever. These are the highest estates known in our law; they are absolutely inheritable, and inheritable freeholds: 2. Fee tail estates, called at common law and before the statute *de donis fees conditional*; these are also freeholds of inheritance, and are made to a man and the heirs of his body lawfully begotten, general or special: 3. *Base fees* or a qualified fees, as a grant to A and his heirs, tenants of Dale; that is, so long as he and they remain tenants of Dale, this kind of estate too may be inheritable. There are also four kinds of freeholds for life and not inheritable, and three kinds of estates less than freeholds, as will be stated hereafter.

2 Bl. Com.
104.—1
Cruise, 17.

§ 2. The idea formerly was, that a fee was that which was held of a superior. This was the feudal notion. The tenant in fee rendered rent or service to this superior, in whom it was considered the absolute property was: the tenant in fee in possession "is seized in his *demesne* as of fee." But now in England, and always in this country, the word *fee* is used rather to express the continuance of the estate, and now invariably signifies an estate of inheritance; and fee simple is an expression often used in contradistinction to fee conditional at common law or fee tail by statute.

2 Bl. Com.
109.

§ 3. The fee simple or inheritance generally abides in some person, but may however sometimes be in abeyance, that is, in expectation; "there being no person in *esse* in whom it can abide." The word *heirs* is essential to make a fee or an estate of inheritance by deed or grant; therefore a gift to A and his heir, the heir can take nothing, but a gift to A and heirs conveys a fee. So a gift to A or his heirs is an estate for life only; so a gift to A and B and heirs, is only a life

2 Bl. Com.
106.

2 Bl. Com.
107.—4
Cruise, 439,
440, 441, 442.
—Flow. 38.

CH. 125. estate for the uncertainty. A gift to A and his children and their heirs, gives a joint estate to him and his children then born; so to A and his assigns forever is but for life.

Art. 3.

Co. Lit. 8, 9.
—2 Bl. Com.
208.—4 D. &
E. 39.
Co. Lit. 10,
11.

Co. Lit. 10,
11, 12, 13.

4 Cruise, 441,
442.

Co. Lit. 26,
27.

Doct. & Stud.
66, 67.—
Co. Lit. 223.

18 Ed. I.

6 East, 173,
182, Doe v.
Pearson & al.
—1 Johns.
Ca. 231.

But this rigid rule of law holds only in grants and conveyances by deed, and therefore is dispensed with in sundry cases in which an estate of inheritance may pass without the word *heirs*: 1. By devise by the express intent of the devisor; as where land is devised to A, and that he shall pay £20 for it to the executor; so to A to give, sell, or forever, or in fee simple, or to him and his assigns forever, or to him or his blood, gives a fee simple and an estate of inheritance in fee: 2. An estate of inheritance in fee passes by a release of one joint-tenant or parcener to one of the others only, or to all, or by disseizor to disseizor: 3. By recovery, for where a fee is demanded in the writ the judgment shall be intended to pursue it: 4. A gift to A and his heirs, and to B as fully as A has his estate: 5. A gift to a corporation aggregate, for it never dies: 6. A grant of a rent to a parcener to make the partition equal: 7. By disseizin, or a bare agreement in *pais* to a disseizin to my use: 8. A gift to A and his heirs of the body of his father, A has a fee simple: 9. So a gift to A and his heirs males gives him a fee simple, for it is not limited from what body the heir must issue, which to make an estate tail is necessary to be done by express words, or other words equivalent.

§ 4. If A enfeoff B of land in fee, upon condition, that if B alien, A or his heirs may re-enter, this condition is void, for such a condition is against the grant and the purity of an estate in fee simple; but a condition that B shall not alien to this or that man, is good. So a devise in fee upon condition the devisee shall not alien, is on the same principle.

§ 5. By the statute of *quia emptores*, never adopted here, a very important change was made in the English law. That statute enacted, that upon all sales or feoffments of lands the feoffee should hold them not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held the lands. This was to prevent subdividing tenures.

§ 6. For breach of condition in a devise, by one devisee, each heir may recover his part of the estate. As where A bequeathed several legacies and annuities, to be paid by his executors out of his real and personal estates, charged therewith; and devised certain lands to B and C, two of his five daughters, and their heirs, as tenants in common, on condition that if either of them had no issue, she or they, having none, should have no power to dispose of her share, except to her sisters or their children; and devised all the residue of his estate to said B and C, in fee, and made them executrices: on his death they entered, and B levied a fine of her moiety

to the use of her husband in fee, and died. Held : 1. The condition against alienation, but to sisters &c. was good : 2. For breach of it by B in levying the fine, the heirs of the deviser might enter on her moiety, being a remainder not disposed of by the residuary clause, as this was meant to operate only on such estate as was not disposed of by the will at all : 3. Held, that one of the several co-heirs of the deviser might enter for non-performance, or breach of the condition, and recover her own share in ejectment : 4. Where entry upon a claim by one of several coparceners, who make but one heir, is lawful, such entry made generally will vest the seizin in all as the entry of all.

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Art. 3.



§ 7. *An after clause in a will referring, by the words, as aforesaid, to a former clause, construed by it, &c.* As where Charles Newcomb devised to his daughter, Hannah Newcomb, certain tenements by name, for her life ; but if his son Spencer, and daughter Ann, (to whom, and to whose children, he meant the reversion and inheritance, if Hannah died without issue,) should pay Hannah £1000 for her life estate, then he devised certain of the premises to said Spencer and Ann, for their lives, share and share alike, and on either's death first dying, devised his or her share among the child or children of him or her so dying, and his, her, or their heirs, the remaining share to the survivor, Spencer or Ann, and his or her issue equally ; and if Spencer did not marry and have issue, then his moiety, after his death, to the child or children of said Ann, by her husband Meredith, and his and their heirs forever, equally and in common ; but if Hannah died in possession, unmarried and without issue, then to Spencer and Ann, and to the issue of their bodies, and their heirs, as tenants in common as aforesaid. Held, these words, *as aforesaid*, drew down to the second clause the limitation of the first ; and shewed the testator meant Spencer and Ann, and their children, should take such estate on Hannah's dying in possession and without issue, as they would have taken if the £1000 had been paid : 2. Held, a younger child of Ann, born after the testator's death, and before Hannah died, (or of Spencer, who died without issue,) was entitled to a share in the moieties both of Spencer and Ann : 3. That Ann's eldest son was entitled to a share in both moieties, though he died before her : and 4. On his death his share in Spencer's moiety descended immediately to his next brother, and heir at law ; as did also his share in Ann's moiety, on her death after him.

10 East, 503,
511, Meredith
v. Meredith.

§ 8. Wherever a precedent limitation fails by any means whatever, the after limitation takes effect : 2. Wherever an absolute property is given, and a particular interest is given

2 Johns. Ca.
314, Jackson
v. Darland.—
Willes, 293.
v. Frank.

—Lofft, 97.—4 Barr. 2246, Fen v. Lowndes.—3 Maule & S. 25 to 62, Driver

CH. 125. in the mean time, as for instance, until the devisee comes of age, this is no condition precedent, but a description of the time when he in remainder is to take possession. And the intention of the testator is to be collected from the whole of the will, and must govern, and the will construed according to it, if the words will bear such a construction. Hence an ill worded will was construed to give an estate in tail to all the testator's grandsons, except the eldest, being the testator's manifest intention appearing in the will; he meant to make a new family in the second son &c.

**1 Wills. 247,
Dorer. Geary.**

§ 9. Where the testator devised to his wife £700 India stock, and had none, held £700 bank stock he had transferred to him after he made his will, passed by it to her; this she had as executrix to A and as administratrix to B, and so transferred it. Mere mistake in the description; he meant this bank stock.

**Dougl. 770,
Roper v. Rad-
cliff.—9 Mod.
167.**

§ 10. A devisee of the surplus of lands, arising from the sale of lands, after payment of debts and legacies, has an equitable interest in the lands themselves, and has his election to pay them and keep the lands. An after devise to one who cannot take, may however revoke a former will. 10 Mod. 230 to 242, same case, and many cases cited in the House of Lords.

ART. 4. Estates by descent.

**Co. Lit. 18.—
2 Bl. Com.
201.**

§ 1. Descent is where an estate is vested in a person by the mere operation of law; where on the death of the owner, the law transfers it to and vests it in his heirs.

**3 Cruise, 372,
374, 375, &c.**

§ 2. Though it is not so material in the United States as in some other countries, to inquire how the owner of an estate comes by it, yet however it is important in some cases to make this inquiry, as well in regard to the future disposition, as to the recovery of it. Descent is directly opposed to purchase, by which one has title solely by his own act. In case of descent the law casts the estate on the heir, on the ancestor's death. "Ancestor and heir are *correlative*, and so whoever represents me, as to my estate, vested in him after my death, I represent him during my life as to that estate." Hence where a man has a use, or an estate, in himself, and limits either to his right heirs, he is still seized. So to give an estate in me to my heirs is not parting with it, for it is but a disposition to myself.

**Gil. Law of
Uses, 19, 20,
21.**

**Hob. 30.—
Gil. Law of
Uses, 21.—
Watkins, 157.
—Dougl. 486
to 502, Doe
v. Fonnereau.**

§ 3. And if A being seized of lands, grant them away for his own life, or in tail, remainder to his own right heirs, they take by descent. So if "one limit an estate to me for life, with a remainder to my right heirs, though after never so many particular estates, the remainder is vested in me; for my heirs are in me." And it is a general rule, that whenever "the ancestor takes a freehold, and after a remainder is limited to

his heirs, the fee vests in him," and the estate on his death descends to them; but otherwise "if the first estate be for years;" for then he has no freehold, and on the principle of the common law, the tenant for years was only a bailiff or servant to the owner. The same rule of law holds of a use. CH. 125.
Art. 4.

§ 4. If the ancestor covenant for himself and his heirs, to keep my house in repair, the heir is bound to perform only when he has assets, or estate by descent from the covenantor sufficient. By our law, even in such case of binding the heir, and assets descended, the executor or administrator must be sued, except in some special cases arising on our statute of February 14, 1789, before stated. 10 Mod. 370,
375, Wood-
wright v.
Wright.
2 Bl. Com.
244.—
Finch's R.
86.

Heirs are *lineal*, and are such relations as descend one from each other, and both of course from the same common ancestor. Collateral heirs are such as descend from the same common ancestor, the *stirps* or root, but not from each other. Heirs must
be citizens
&c., 3 Cruise,
375; & legit-
imate, 374.
2 Bl. Com.
210, 235.

§ 5. *What estates can descend.* Rules in the English law as to: 1. The person last actually seized, and as to the estate never lineally ascending: 2. The males being preferred to the females: 3. The eldest son only inheriting when there are several in equal degree: 4. Whole blood: 5. Ancient feuds and *possessio fratris*: and 6. The preference of paternal to maternal relation, do not apply in this Commonwealth. Our law does not require the intestate to be actually seized, and in some cases the father inherits as next of kin, as was the case in the Jewish and Roman laws; and so the mother and other lineal ascending ancestors. Nor does our law make any distinction between males and females, nor between whole and half blood; nor between paternal and maternal relations; but see the new statute of Descent &c., March 1806, post. Males were preferred among the Jews and Athenians; but not among the Romans. Our law gives the males and females each an equal share in an equal degree. Our laws, as did those of the Jews, Greeks, and Romans, look only to the person last seized of the estate, and to the right.

§ 6. A descent between brothers and cousins is immediate, and one may make title to the other without naming the common ancestor. See 3 Cruise, 381. Sid. 196.—2
Bl. Com. 226.

§ 7. Lands in England, before the conquest, descended equally to all the issue, and were all *gavelkind*. So was the Roman law; nor did it know any distinction between whole and half blood. 2 Salk. 129.
—Hoffman,
263, 264.

§ 8. If an estate be limited to or remain in the ancestor, and another estate is limited to his heirs, general or special, such estates shall, in many cases, coalesce, and the heir Watkins, 167,
160, 161, 162.
—6 Cruise,
324, 325.—
Salk. 241,
Co. 104, Shel-
ly's case.—Cart. 170.

CH. 125. take by descent. "As where in the same conveyance or gift the ancestor takes a freehold, and an estate is limited to his heirs, mediately or immediately, in fee or in tail; here the words, *his heirs*, are words of limitation, and his heirs are in by descent. And charging the remainder or reversion with debts or incumbrances, does not alter the descent;" but otherwise, altering the nature of the estate. But that the estates may unite, they must be both legal estates, or both equitable estates, must be both freehold, and not one for years, and the heirs must be the heirs of the ancestor who takes the particular estate. 2 Cruise, 268, 269.

§ 9. If an estate be limited to A for life, remainder to his right heirs in fee, they take by descent; for wherever the ancestor takes an estate for life, the heir cannot, by the same conveyance, take a fee by purchase. The ancestor, during his life, bears in him all his heirs; and hence when he is, or might be, so seized of the land, the inheritance so limited to his heirs vests in the ancestor himself. The word, *heirs*, in this case, is not a word of purchase, but of limitation; and enuring so as to increase the ancestor's estate from a tenancy for life to a fee simple.

§ 10. When the words, *heirs* or *issue*, are collective, they are words of limitation:—so children; as whenever an estate is given to A and his children, and cannot go over while A has issue, *children* is a word of limitation, because here necessarily to be understood to mean *issue*.

§ 11. If the father devise lands to his son and heir, he to pay debts out of the land, he is in by descent; but if the tenure be altered, or the quality of the estate, he is in by purchase; but a charge on the estate does not alter the manner of the heirs taking it. And a devise is void which gives the same estate that is taken by descent, as the title by descent is the first. Moore, 644; 3 Burr. 1626.

§ 12. "If an estate be limited to A for life, the remainder to the heirs males of the body of A, and to the heirs males of such heirs male," the estate is vested in A, and descends, for by the limitation it passes no otherwise than it would descend.

§ 13. Edward Shelly and wife, tenants in tail, suffered a common recovery, "to the use of the said Edward for life, without impeachment of waste, and after his decease to the use of Mr. Caril and others for twenty-four years, and after the said twenty-four years ended, then to the use of the heirs males of the body of the said Edward Shelly lawfully begotten, and of the heirs males of the body of such heirs males lawfully begotten, and in default of such issue," then over, &c. [Said Edward died the morning of the day this recovery was had,—

1 Co. 104,
Shelly's case.
—Law
Tracts, 551.
—Co. L. 376.
—Raym 203,
334.—2 Bl.
Com. 241.—4
Com. D. 470.
—Ambl. 358,
376.

3 Salk. 392.
—1 Co. 66,
case of Arch-
er.—1 W. Bl.
265.

2 Stra. 12, 70.
Watkins, 174.
—Hob. 30.—
Salk. 241.—
Roll. Abr.
626.—Cro.
El. 833, 916.

Gil. Law of
Uses, 23—14
Mass. R. 90.
—6 Cru. 146.
—1 Co. 90 to
107.

Shelly's case,
& above, 1
Hen. & M.
240.—2
Wash. R. 9.—
Co. L. 361.—
1 Wash. R.
267.—1 Bay's
R. 453.

and held good.] He had a son Henry, and a second son Richard. Henry died, living his father, and before the recovery, leaving issue, Mary, and his wife pregnant of Henry, the deft. October 17 the recovery was executed, and December 4 the deft. was born. Said Richard was lessor of the plt. Judgment for the deft. And the court decided, that he was in by descent; though it was urged, that Richard was in by purchase by reason of said words, "and the heirs males of the body of such heirs males," which must be void if the issue were not purchasers; and that one in by purchase shall not give place to an after born heir; also that the recovery was not executed in the life time of the said Edward, so no estate thereby vested in him, and so none could descend from him; and then the issue necessarily took by purchase; as the deft. was not born when executed, and so vested, he could take nothing, but Richard, the next heir male by purchase, took the estate. But it was answered, that the execution of the recovery related back to the indentures and recovery, which were in the life time of the said Edward, and so the use vested in him and then descended; and hence Richard was in by descent, and then an after born heir might enter upon him; and also that the indentures directed the use by way of limitation, and it was an established principle that where the ancestor took an estate for life, "and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or tail, that always, in such cases, the heirs are words of limitation of the estate, and not words of purchase." And all the twelve judges of England, except one, held that Richard "was in, in course and nature of descent:" 1. Because the recovery out of which all the estates and uses had their essence, was had in the life time of the said Edward, to which the execution had a retrospect: 2. Because the use and possession might have vested in him, if the execution had been sued in his life time: 3. The recoverers, by their entry, nor the sheriff by doing of execution, could make whom they pleased to inherit: 4. Because the said Richard claimed the use by force of the said recovery, and of the indentures by words of limitation, and not of purchase. In considering the descent, no notice was broken by the bar or bench of the term of 24 years.

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Art. 4.

§ 14. In this, and similar cases, it may be observed, that if to the words, *heirs of the body*, in the plural number, the words, *and their heirs*, be added, it makes, in fact, no difference, and thereby the course of the descent is not altered; for when the limitation, for instance, is to A or to A for life, and remainder to the heirs or issue of his body, in the plural, it is to all the heirs or issue of his body, and goes to their

See Ch. 129,
a. 2, s. 35.

CH. 125. heirs, of course. But when the limitation is to A, as above,
 Art. 4. and to the heir male, or next heir male, &c. in the singular
 number, and to his heirs, then the course of descent is changed; for in this case one child or heir takes all to him and his heirs, and the other heirs or issue of A's body are excluded; whereas by descent they would be included, either all the heirs or issue of his body, or all the heirs males or heirs females &c., as the case might be; the giver or grantor, by naming one heir in the singular number, shews he has one person in view.

1 Burr. 38 to
 52, Robinson
 v. Robinson,
 A. D. 1756.

§ 15. July 1723, George Robinson (among other things,) devised a certain estate "to Lancelot Hicks, for and during the term of his natural life, and no longer;" (provided he take the name of Robinson, and live on the estate, which he did;) "and after his decease to such son as he shall have lawfully begotten, taking the name of Robinson, and for default of such issue, then" to William Robinson, in fee, the testator's heir. The court held, that Lancelot Hicks, by necessary implication, to effectuate the manifest general intention of the testator, took an estate in tail male, (taking the name &c.,) though there was an express estate devised to him for his life, "and no longer," because it appeared that William Robinson the testator's cousin and heir at law, as well as devisee over in fee, was not to take till failure of issue of Lancelot Hicks. He had no son at the time of the devise. This decision was confirmed in the House of Lords, 1758. 6 Cruise, 15; 4 D. & E. 82; 8 D. & E. 5.

2 Mod. 207,
 Southcot v.
 Stowell; cited 4 Cruise,
 449.

§ 16. Thomas Southcot had two sons, P. & W., and on the marriage of P. the eldest covenanted to stand seized of the premises to the use of the said P., "and the heirs males of his body on Margaret his wife to be begotten, and for want of such issue, to the heirs males of the covenantor; and for want of such issue, to his own right heirs forever." P. had issue by his said wife, a son, Edward, and five daughters, and died. The covenantor died, and the said Edward died without issue. The question was, if the five daughters, as heirs general of the covenantor, or the said W., their uncle, as special heir male of the covenantor, *per formam doni*, should inherit the estate. Judgment for W. that he takes *per formam doni*, by descent, as special heir, and by the express intent of the covenantor. And it was said for W., that the covenantor took an estate for life by implication, and so the estate tail was vested in him, and hence it descended to W., his special heir in tail. But this the court doubted; for the covenantor parted with his whole estate, and limited no use to himself; though it was said for W., that the covenantor had a reversion in the use, as no one would be his heir while he lived, and

right heirs, by that name, cannot take by conveyance, use, or devise, and to this purpose many authorities were cited. CH. 125.
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This point was not decided; but the ground for W., most relied on by his counsel, was that adopted by the court; that is, that he took by the form of the gift.

§ 17. A devise may be void in part and good in part, as to one entire thing. As if I devise one moiety of black-acre to B, and his heirs in fee, and the other moiety to him in tail; the heir takes the fee by descent, the devise as to that being void, and the part in tail by purchase, the devise as to that being good. Pow. on D.
442.

§ 18. And if the devisee refuse the devise, the estate descends; and so if he impliedly waives it. Trust estates descend as legal ones. Pow. on D.
443. 3 Cruise, 399.

§ 19. *So the estate descends, if the devisee cannot take.* 9 Mass. R.
419, Barker
v. Wood.
This was a plea of land, in which Barker demanded against Wood possession of about 40 acres of land in Boxford, bounded &c., part of the Chadwick farm, of about 100 acres; and the demandant declared on his own seizin within 30 years, and the disseizin of the tenant,—writ dated March 9, 1808. Plea, the general issue. February 15, 1806, Sarah Chadwick was seized in fee of this farm, and many other parcels of estate, made her will, bequeathed many legacies &c.; but the question was, if the devisees could take under the following clause in her will, duly proved May 6, 1806, viz: "I give to Joseph Parker the use and improvement of all my buildings and lands (except &c.) in the town of Boxford, to be so used and improved &c., and to be kept &c., during the term of his natural life; and after his decease I give the use, improvement, and income of the aforesaid buildings and lands, viz: the incomes and profits arising by renting or letting the premises to the halves, which may be thought the most profitable, to be expended for the use of the schools among the inhabitants living in the north-west parish (formerly called the second parish,) in the town of Boxford; confining it only to the use of the inhabitants of said Boxford, and to be distributed among the schools in the said parish, in the same way and manner as money raised by the town for the support of shools is apportioned among the several districts in the town forever; and keep the said premises in the name of Chadwick to the remotest period of time; the income of which to be appropriated to the aforesaid use." The testatrix made the tenant her executor, who proved the will, and was in possession. After the death of said Parker, the tenant entered, December 29, 1807, being an inhabitant of said parish, for himself and the other inhabitants of it, claiming under the said clause to their use; this parish included certain inhabit-

CH. 125. ants of the town of Andover ; and the inhabitants of said parish, within the town of Boxford, were, when said will was made, defined, and known as two school districts in Boxford, and the question was, if this remainder was legally devised to them. The testatrix left her aged mother, her heir at law, who gave her deed of the estate to the demandant under which he claimed it, dated January 2, 1808. The court said, " The remainder expectant on the death of Joseph Parker was appropriated by the testatrix, " to be expended for the use of the schools among the inhabitants living in the northwest parish in the town of Boxford, confining it only to the use of the inhabitants of said town of Boxford &c. The case finds that the northwest parish included certain inhabitants of Andover. These latter being excluded from the benefit intended, the remaining inhabitants were not a corporation and they cannot take as tenants in common. The heir at law must hold until some one can make title under the will."

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ART. 5. *Estates by purchase, not by descent.*

See Ch. 127,
a. 2, s. 29, a.
11.—Gilb.
Law of Uses,
23.

§ 1. " If one make feoffment to my use for years, remainder to B in tail, remainder to my right heirs ; this is not vested in me, but my right heirs take by purchase." In this case no freehold or life estate is limited to me but only a chattel. In this case the words, *right heirs*, are *descriptio personarum*.

Dougl. 486 to
509, Doe v
Fonnereau.

§ 2. So if a gift be made to A by deed, and a devise to his issue, these estates being by different conveyances do not unite. As if an estate be made to A for life in a deed, and there be a limitation of the same estate by will to the heirs of his body, they do not unite so as to give A an estate in tail, (though the life estate by deed be recited in the will) but the heirs of A's body take by purchase.

6 Co. 17,
Wild's case.
—Salk. 126.
—Dougl. 431.
—2 Bos. & P.
485.—
3 Atk. 397.

§ 3. In this case it was resolved, that " if land be devised to A and to his children, or issue," and he has none at the time of the devise, the same is an estate tail ; for the intent is the children or issue take, and as immediate devisees they cannot take, because they are not in being, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate ; hence the words shall be taken as words of limitation, issue of his body. This was a supposed case in Wild's case, which was thus : land was devised to A for life, the remainder to B and the heirs of his body, the remainder to " Rowland Weld and his wife, and after their decease to their children." Rowland and his wife died, then having issue, a son and daughter ; afterwards the deviser died, and after his decease A died ; B died without issue ; Rowland and his wife died, and the son had issue, a daughter, and died. The question was, if his daughter should have the land. All the judges of England resolved, that Rowland and his wife had but an estate for life,

with remainder to their children for life, and no estate tail. So the children took by purchase. CH. 125.
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§ 4. Purchase includes every way of coming to an estate, except descent, or the simple operation of law, as also in dower and by curtesy. And purchase is by *escheat*, by occupation, by prescription, by forfeiture, and 5th, by alienation. All chattels, real and personal, and all personal estate must be by purchase, none of it can be by descent, only a fee descends. 2 Bl. Com. 241.
Fearn, 301 to 315.

§ 5. And if A devise his estate to his heir at law in any other shape than he would take it by descent, such heir takes by purchase, as wherever the nature or quality of the estate is changed. But if he take an estate by the will neither greater nor less than he would by descent, he is in by descent, even though possibly the estate may be charged with incumbrances. 4 Bac. 302.—
2 Bl. Com. 341.—Ld. Raym. 728.—
Salk. 241.—
2 Mod. 286.
—Gilb. Uses, 25.

§ 6. If an estate be limited to the heirs of A, he takes nothing, and they take by purchase, as they never can take by descent from A, where nothing vests in him ;—by purchase, or not at all. 2 Bl. Com. 242, and 1 D. & E. 634, Allen v. Palmer.—Leon. 101.
3 Salk. 292.

§ 7. "The words, *heirs* or *issue*, when used to denote a single person, or so as to be only *designatio personæ*, are words of purchase only, but when collectively, they are words of limitation."

§ 8. A devise "to J. S. for his life, and afterwards to the next heir male of J. S. and to the heirs males of the body of such next heir male." J. S. has but an estate for life, and his next heir male a contingent remainder by purchase ; and this was destroyed by J. S. enfeoffing K. with warranty, or rather barred by the warranty descending on John, the son and heir of J. S. 1 Co. 62 to 68, Archer's case.—6 Cru. D. 356, 360.—2 Saund. Wms. 382.—1 Vin. 230.—3 Binn. 374.

§ 9. "A devise to A for life without impeachment of waste, and in case he have any issue male, then to such issue male and his heirs forever, and if he die without issue male, then to B and his heirs forever." The court decided, that A had but an estate for life, and both remainders are contingent. In this case six points were decided : 1. That A only took an estate for life : 2. That issue here is *nomen singulare*, because the inheritance is annexed to the word *issue*, and is in the issue, and not in A : 3. The limitation to the issue is a contingent remainder, being after a freehold, so a posthumous son could never take : 4. It is a remainder in fee ; hence the remainder to B is a contingent remainder in fee : 5. Not vested, because on a prior contingent fee to A's issue : 6. A's recovery destroyed both contingent fees, by destroying his freehold that supported them. Salk. 224, Loddington v. Kime.—4 D. & E. 294.—6 Cruise, 356.

§ 10. "If an estate be devised or conveyed to A for life, the remainder to his next heir male, and to the heirs males of the body of such heir male," A has but an estate for life and Gilb. Law of Uses, 24.

CH. 125. a contingent remainder in his heir as a purchaser ; and *heir* in the singular number is only a word of purchase, and not of limitation. So Watkins on Descents, 170, next heir male is a purchaser, but a devise to a man and his heir passes a fee simple, for here the word *heir* is a collective name.

Gilb. Law of Uses, 24.

Gilb. Law of Uses, 25.

Watkins, 176.

§ 11. So heirs males of the body of B now living, is a *descriptio personæ*, and they take by purchase a vested remainder, and many cases cited. 4 Durnford & East, 296 to 300. And Watkins on Descents lays it down as a rule, that whenever the deviser alters the estate and limits it differently from what it would descend to the heir, then the heir takes by purchase, it being another estate, and descends from him, the heir, as first purchaser to his heirs, and (in England) first to his heirs on his father's part as most worthy, then to those on his mother's part.

Watkins, 177, 179.—Flow. 545.—Lutw. 797. Allen v. Heber.—Salk. 261.—Ambler, 383, Scott v. Scott.—Salk. 242, Reading v. Royston.—6 Cruise, 146, 147.

§ 12. If A devise to B his heir in tail, B takes by purchase, for the estate devised differs from a fee simple, the estate that the heir would take by descent. So a devise to four daughters who are the testator's heirs at law, they take by purchase, for by the will they take as joint-tenants or as tenants in common, but as heirs they take as coparceners. So a devise to three sons, in *gavelkind* heirs at law, they take by purchase as joint-tenants, but would not take as such by descent. Where one devised to his son and heir, "but in case he died without issue, not having attained twenty-one years of age," then over, he takes by this devise as a purchaser, as having a different estate from that which would have descended to him, as the one that would have descended would have been pure and absolute, and the one devised not so. Cro. El. 431.

4 D & E. 294, Doe v. Collis.

§ 13. So a devise to A during her natural life, and after her death to the issue of her body lawfully begotten, and their heirs forever, she then having one child, this is only a life estate in A. In this case one Newsom 1771, devised certain lands to his wife for life, remainder "to his daughters, Eleanor Newsom and Susanna, wife of W. Head, to be equally divided between them, not as joint-tenants, but as tenants in common, to wit, one half to Eleanor and her heirs forever, and the other half to Mrs. Head during the term of her natural life, and after her decease to the issue of her body lawfully begotten, and to their heirs forever." The testator died in 1762, and his wife in 1772. Mrs. Head had three children, one born and living when the said devise was made, and two after, one in 1762 and the other in 1768, and the three children were lessors of the plt. In 1771 the said Head and wife levied a fine under which the deft. claimed. It was held, that Mrs. Head took but an estate for life, and so the fine was void ; and that her issue, her three children, took as purchas-

ers; that *issue* is a word of purchase or of limitation, as will best answer the intention of the devisor, though in a deed it is universally taken as a word of purchase: that if Mrs. Head had an estate tail, then the division between the two daughters could not be equal, and Eleanor and her heirs will take part of the reversion of the moiety of Mrs. Head. In this case many authorities were cited, and it was said that one distinction run through them all, "that if there be no children living at the time of the devise, *issue* is taken to be a word of limitation, but if there be any, and words of limitation be added to *issue*, it is construed to be a word of purchase," "that there are no technical words in a will;—Archer's case was to the next heir male;" and Wild's case was "to Rowland Wild and wife, and after their decease to their children," he then having two children;—and whenever one takes by description the estate vests by purchase.

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§ 14. In *gavelkind* lands the word *heirs* in the plural is equivalent to the singular, *heir*, in common cases. As where Martin Long seized in fee of *gavelkind* lands, devised three fourths of them to A, B, and C, with special limitations, and the remainder, one fourth part, "to Ann Cornish and to the heirs of her body lawfully begotten and to be begotten, as well females as males, and to their heirs and assigns forever, to be divided equally between them as tenants in common, and not as joint-tenants," when the will was made Ann Cornish had two daughters, and afterwards died in the testator's life time; and the court held, that the two daughters took as purchasers. And Lord Mansfield said that general rules have been often dispensed with, as in *Backhouse v. Wells*, in *Robinson v. Robinson*, *Lisle v. Gray*, *Allgood v. Withers*, *Papillon v. Boys, &c.* This case shews "that *heirs* were intended to be words of purchase." "1. These are lands in *gavelkind*, in which the plural word, *heirs*, is equivalent to the singular, *heir*, in common cases." This has been often deemed a word of purchase; "the word *heirs*, therefore, is here merely description of persons to take after the death of Ann Cornish." Her estate was only for life.

1 W. Bl. 265,
267, Long or
Doe v. Lam-
ing; same
case, 2
Burr. 1100,
1113.—
6 Cruise,
158, 346.

§ 15. In this case a devise was made "to the heirs of Margaret White, jointly and equally, and their heirs and assigns forever." The court held that this was a *designatio personæ*, and that her son took as a purchaser in her life time. This, after some terms for years, was a devise to the testator's "son, Richard Bookin, and his heirs males, and to the heirs of his daughter, Margaret White, jointly and equally, to hold to the heirs male of the said Richard, lawfully begotten, and to the heirs of Margaret, jointly and equally to their heirs and assigns forever." And for want of male heirs of Richard at his death,

2 W. Bl. 1010
to 1013,
Goodright
v. White,
cited 6
Cruise, 186.

CH. 125. the devise was "to the said heirs and assigns of said Margaret,
 Art. 5. lawfully begotten of her body, to hold to the heirs and assigns of the said Margaret forever." This will was made August 17, 1753; this testator died October 1753, leaving his widow since dead, his son Richard, his heir, and five daughters, the said Margaret was one of them. The said Richard when the will was made had a son Richard, lessor of the plt., and two daughters; the said Margaret the deft. had then one son, and after the testator's death another son, both living at the time of the action, and no other children. On the testator's death she entered and held two years, when Richard, the son, entered, and held till he died in 1757, leaving the lessor of the plt., then said Margaret entered. In 1774, Richard brought ejectment, and she obtained a rule to the defts. for a moiety only. It was objected that the devise to the heirs of Margaret was void, as Richard died, living Margaret, *for nemo est hæres viventis*, but it was said for her son, that heir is equivalent to issue and a *descriptio personæ*, and so the son took a moiety. Cited James v. Richardson, 1 Vent. 334, Walker v. Snow, 359; Long v. Beaumont, 1 P. W. 229; and Long v. Laming, 2 Burr. 1100; and 2 W. Bl. 1010. 4 Cruise, 481.

§ 16. In this case the court held, that there was a "good description of the person to make the son of Margaret take as her heir, living the mother." Though bad two centuries ago, it had been good for a century past; latterly, said the court, words have been taken in their popular sense, the testator noticed that Margaret was alive, "and meant a present interest should vest in her heir, that is, her heir apparent during her life." And judgment for a moiety was rendered for him; however cited, the word *heirs* of Margaret in the plural number was the word in the will. This is a very strong case, and shews clearly how the words, *right heirs of A* may be good words of purchase, and such heirs take the estate in his life time.

1 D. & E. 630, Doe v. Quarterly. § 17. Charles Blunt when he made his will noticed his relations, Walter Read and Mary his wife, they then had a daughter Hester Read, and Mary Read was supposed to be pregnant of another child. The testator devised to Hester in fee tail, in default &c., to said children in tail, in default &c., "to the right heirs of Walter Read and Mary his wife forever." On the testator's death Hester entered, the wife was not pregnant, Read and wife died, living Hester; they had no child but her. The court decided that Hester took the whole by purchase, by the description of right heirs, though that description was used, living her parents. Hence a child living her ancestor purchased by the description of right heirs;

(Hester died without issue) the plt. was her cousin and heir at law. So heirs of *baron* and *feme* is the same as issue. It was objected that the devise to the *right heirs* of Walter and Mary Read was too remote. The limitation contingent depending on Hester's outliving her parents to take effect after the death of a person without issue, and that person not in being. But it was adjudged to be a contingent remainder to vest on the death of Walter and wife, and might have been barred by tenants in tail, and hence no danger of a perpetuity. And there is no perpetuity in contemplation of law, when the tenants in tail in the estate can bar by common recovery or otherwise.

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10 Johns. R.
19.—2
Ferne, 193,
194, 324, 335.

§ 18. In these and many other cases the rule of law appears to be fully settled, that where the ancestor takes no estate, the heir must take by purchase if he takes at all. As "where a person to whose right heirs an estate is limited takes no estate to himself, there his right heirs shall take as purchasers;" for it is impossible for them to take by descent, where their ancestor takes nothing, they can take only by purchase. First and other sons generally words of purchase, but may be of limitation.

1 D. & E.
634, cites
Leon. 101,
Allen v. Palmer.—2 Bl.
Com. 242.

5 D. & E.
323.

§ 19. "A person shall take by purchase when he takes an estate that never vested or might have vested in the ancestor." As if an estate be limited to the *right heirs* of A, and he have nothing in it, the estate never can descend from him who has no interest in it.

Watkins, 155.

"Heirs" &c. are words of purchase; so are the words, *heirs of P*, and a good personal description. Co. Lit. 3.

§ 20. So devise to "the first son of A;" and whenever there is a special description the estate vests by purchase; "*heirs of the body*" are words of purchase. 4 Bac. Abr. 302; Gilb. Uses, 25; 6 Co. 17; Vent. 311; Stra. 41; 4 Bac. 304, 305. So "heir male of my aunt Long," she being alive, is a good description, though not certain he would be her heir at her death. 4 Bac. 305.

4 Bac. Abr.
303.—2
Ferne, 301
to 304.

§ 21. In this case it was held by the court, that "heirs of the body of Sarah," and their heirs and assigns, enabled her children to take as joint purchasers; (so Doe v. Fonnereau, above,) devise to her was during her life, and after her death to them, no priority of birth &c.

3 East, 533
to 538, Doe
v. Ironmonger.

§ 22. Lands were devised to A for life, remainder to the heirs males of the body of A now living, remainder over. Held by the court, that A took only an estate for life, and the remainder was immediately vested in the heirs males of the body of A then living, for those words are a sufficient *designatio personæ* of the taker. Here the ancestor was alive, but the words were used as in "common parlance to denote the per-

Stra. 40.
Burchett v.
Durdant.—
Pybus v. Mit-
ford, Vent.
372.—Baker
v. Wall.—
6 Cruise, 185.
—1 P. W.
229.

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son who would take as heir male if the ancestor were dead; but little stress was laid on the words "*now living*." And in *Baker v. Wall* it was held, that the law allows a man to purchase by any sufficient description; and heir male of the body of J. S. is this description. So is Abbot, bishop of A &c.

In this case of *Burchett v. Durdant* it may be observed : 1. The description of the devisee was only, *heirs males of the body of A* : 2. A was living : 3. The estate immediately vested in the devisee as a purchaser, living his ancestor; and when the objection *quod non est hæres viventis* applied, the words "*now living*" were omitted in *Long v. Laming*.

1 P. W. 229.

Fearn, 44.—

3 Salk. 292.

§ 23. Children to take equally must take by purchase, share and share alike, but an estate tail is to one and the heirs of his body in succession. "Where the father devises lands to his eldest son on condition, he must necessarily in such case take by purchase, and not by descent; because he cannot take an estate on condition by descent,—and *quære*, if he can an estate charged by a devise.

3 Salk. 292,
293.

§ 24. Where a use is by limitation or purchase. The father having two sons, in consideration of marriage of his eldest son, covenanted to stand seized to his use and to the use of the heirs males of his body, remainder to the right heirs of the father. The eldest son married and had issue, Edward and four daughters, and died, and then Edward the grandson died without issue; the four sisters take the estate, and not the son of the father; for the estate vested in the eldest son by purchase, for though at common law a man could not make his own right heir a purchaser, without parting with the whole estate, yet now by the way of use he may, and in this case of the death of the grandfather, both estates vested in Edward, the grandson, as heir male of the body of his grandfather and father. If so, this being a remainder vested in him as a purchaser, the estate shall go on in a course of descent, and his sisters shall have it as descending from him.

2 Mod. 286,
Britton v.
Charnock.

§ 25. The father, being seized in fee of a certain estate, devised part of it to his eldest son (the deft.) and his heirs, within four years from the father's death, provided the son paid £20, part of the testator's debts. The father died and the son paid the £20; the rest of the father's estate he devised for the payment of his debts. The court, North C. J. and Atkins, held, that where the heir as in this case, takes by a will with a charge, he takes by purchase and not by descent; so the land was not assets.

Douglass, 264,
Goodright
v. Dunham &
al.—6 Cruise,
345.—2
Cruise, 282.

§ 26. This was a "devise to A for life and after his death, unto all and every of his children equally, and to their heirs, and in case he die without issue," then over to his two daughters. A never had a child. Held, this was no estate tail, but

that the estates to A's children were contingent remainders in fee by purchase. In this case dying without issue, "being tacked to the preceding clause, meant the same as dying without children." Contingent, because no children were in being at the time of the devise. Where children take equally, they take as purchasers; and equally is not in succession, per Bul-
ler J. and the remainder being in fee to the children the after remainder to the daughters could not be vested. Ch. 135, a. b. s. 11.

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Doe v. Lyde,
9 D. & E.
671.

§ 27. A devise to B and children born of her body, and B then had no children, but afterwards has C, and dies before the testator. B takes but an estate for life; for children being words of purchase, C takes, and "this is not a lapsed legacy."

2 Com. D.
606, cites
2 Atkyns 220,
Baffar v.
Bradford.

§ 28. In this case the devise was to John Baker, "for the term of his natural life, only without impeachment of waste, and after his decease to the issue male of his body, and to the heirs male of such issue male, and in default thereof to John Bracy," the plt's. lessor. The court decided, that John Baker had only an estate for life, and that the words, *issue male of his body*, were words of purchase, the word *only* never has been rejected but when followed by the word *heirs*. In this case the word, *only* was relied upon, also the words, *without impeachment of waste*, as unnecessary if an estate tail, also on the words, *issue male of the body and the heirs males of such issue male*, the plt. who had judgment much relied, as all being strongly in his favour; also he urged that the testator well distinguished between an estate tail and an estate for life in the same will.

Gilb. Cases
20 to 31,
Backhouse v.
Wells; same
case, 11
Mod. 346 to
357, cites
King v. Mel-
ling, Shelly's
case, Ar-
cher's case,
Loddington
v. Kime.
Taylor v.
Sayer, Clerk
v. Day.—
6 Cruise, 356,
357, &c.

§ 29. This was a devise to A during her natural life, without impeachment of waste, and after her decease to the heirs males of her body, severally and successively, and in default of such issue, to daughters equally to be divided between them, as tenants in common &c. The court held, that A had an estate for life only, and that her children were purchasers; and that heirs males of the body, may be explained by other words to be words of purchase. A never had any issue.

1 East, 264
to 276, Good-
title v. Her-
ring.

§ 30. H had two daughters, one of them had a son, and died. H devised the land to the son and his heirs forever. The court held, he took the whole by devise and purchase, and no part by descent; though it was much urged that he should take one moiety by descent and one by devise: and further held, that there can be no descent of a moiety to one coparcener, as heir; that both coparceners made but one heir, and one is not heir without the other; and he took by devise, because nothing could descend to him as one co-heir.

Salk. 242,
Reading v.
Royston.

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10 Mod. 419,
Marks v.
Marks.—
Stra. 120.

Gil. Law of
Uses, 422.

Pow. on D.
440, & Bear's
case,
Leon, 112.—
6 Cruise, 1.

Lofft. 19, Pitt
v. Harben.

Willes, 211,
214, Goodti-
tle v. Wood.
—7 D. & E.
100.—4 Bos.
& P. 399.—4
Ves. jr. 341.
—6 Cruise,
523.

1 Dall. 4, Ash-
ton's lessee
v. Ashton.

9 East, 170,
184, Perrin
& al. v. Lyon
& al., as to
restraint of
marriage.

§ 31. One devised lands to his wife for life, remainder to his second son C, in fee simple, provided that if his third son D in three months after his wife's death, paid C £500 to his executor, then he devised the same lands to D and his heirs. The court decided, that this was a good purchase by D by executory devise.

§ 32. Where an estate is limited to A, remainder to the right heirs of B, they take as purchasers necessarily.

§ 33. One has lands in *gavelkind*, and several sons, and devises them to his sons, they take by purchase, though heirs by the custom, for by devise they are joint-tenants, but by the custom would be as parceners; nor would the case have been altered if devised to them, as tenants in common, they would have had estates different from those by the custom.

§ 34. Devise to four nieces, and if any one of them died without issue, then to the survivors, but if any one of them died having children, then her share to go to them &c. Held, the grand-children of one of the nieces took the whole on the decease of all the nieces, leaving no issue but those grand-children; and this by purchase under the will.

§ 35. Land is devised to A and his heirs; but if he die before twenty-one years of age, then to B and his heirs: 1. This is a good executory devise to B: 2. And if B survive the testator the land will descend to B's heir, though B dies before A; so before the contingency happens B takes by purchase, and this contingent interest will descend; and an executory devise is an interest that will descend as a contingent remainder will.

§ 36. *Who is a devisee and purchaser.* The testator devised lands to the first heir male of A, when arrived at 21, he paying to C and D, the daughters of A, £40 each, after the testator died. A had a son who attained the age of 21, and paid his sisters £40 each. Held, the testator's intent was, that A's first son should take the estate by purchase, subject to said legacies.

§ 37. *Marriage partially restrained, devise of good &c.* As where J. Perrin, seized in fee, devised real and personal estate to trustees to pay out of it, an annuity to his wife for life, and out of the residue to pay a sufficient sum for the education and support of his only daughter, till 21 or marriage, and when 21 or married then to her in fee; but if she died under age and unmarried, then to his wife for life, and after her decease to the two children of his nephew, as tenants in common in fee; but provided, if his wife or daughter married a Scotchman, then the one so marrying forfeited all benefit under the will, and the estates given to the one so marrying should descend to such person or persons as would be entitled under his will, in the same manner as if his wife or

daughter were dead. Held : 1. This partial restraint of marriage was legal, and the daughter, when a minor, having married a Scotchman, and died leaving a son, he could not inherit, nor her husband be tenant by the curtesy : 2. The testator's wife being dead, the limitation over to said two children of the nephew (still living) took effect immediately on such marriage, as they were the persons designated by the will to take in the event which had happened ; the testator having considered such prohibited marriage the same as the death of the daughter under age and unmarried. 6 D. & E. 213, 216.

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Art. 5.

§ 38. Devise to A and the heirs of her body, and for want of such issue to B. A died before the testator, leaving issue who survived the testator. Held, such issue could take nothing,—not as purchasers, as they were not made such ; not by descent, for their ancestor took nothing ; but the limitation to B vested as an immediate remainder on the testator's death, and not an executory devise ; but if A had survived the testator, she would have taken an estate in tail. *Goodright v. Wright*, 1 P. W. 397 ; 3 Bro. P. Ca. 435 ; see a. 7, s. 16, &c.

Dougl. 337,
Hodgson &
al. v. Am-
brose & al.—
6 Cruise, 151,
Brett v. Rig-
den, Fuller v.
Fuller, Hut-
ton v. Simp-
son.

§ 39. A grants to B for life, remainder to the heirs male of A's body. His heirs male take by descent. But if such a limitation be made by a third person in a deed, or by a will, the heir male takes by purchase.

2 W. Bl. 687,
Wills v.
Palmer, 5
Burr. 2616.

§ 40. A woman tenant in fee, for the maintenance of herself and children for life, made a settlement, and to raise portions for younger children, and the surplus to her heir at law, (she then having many sons and daughters.) Held, this was a voluntary settlement, and void against purchasers under the 27 El. ; and a lessee at *rack rent* is a purchaser for a valuable consideration. The settlement was made in 1747, and the lease to the deft., Moses, in 1759, for twenty-one years, at £55 a year, so he purchased after the voluntary settlement. The deed of 1747, was only for a *good*, not a *valuable* consideration.

2 W. Bl. 1019,
1022, Good-
right v. Moses.

§ 41. *Estates by limitation.* These have been already considered pretty much at large in several chapters and articles, especially under the head of Remainders and Reversions, and Executory Estates, and more especially under the head of Estates by Descent, and not by Purchase, art. 4th this chapter, and several cases art. 5, Estates by Purchase and not by Descent. These kinds of estates run much into each other ; so much so, that we often see several different kinds of them included in the same will or deed, and sometimes in the same suit or action.

Limitation for life by deed poll. This was a gift from father to his son, whereby, without naming a consideration, he gave, granted, bargained, and sold to his said son, John Allingham,

2 W. Bl. 1185,
Wright v.
Dowley &
ux.

CH. 125. the premises to hold to him and his assigns forever, on condition to pay his brother Richard, grantor's youngest son, £100 Art. 5. at the end of his apprenticeship. Grantor reserved the rents to himself for life, and if said £100 was not paid, Richard had a right to enter and hold the premises till paid; and if John truly paid, the grantor forever warranted &c. Held, John took only a life estate; this was by deed, and only to assigns.

2 W. Bl 1211,
Green v. King.

§ 42. Limitation, by surrender, construed as a voluntary settlement by deed,—“to husband and wife, and the survivor, and after the death of the survivor to the right heirs of both.” Held, this limitation was an immediate fee simple in husband and wife by *entireties*, and the husband could not devise any part of it, but on his death the whole survived to the wife; the wife was not bound, but being for her benefit her consent was presumed. The word *heirs* was taken in its legal sense, as a word of limitation, as there was no proof it was meant as a word of purchase. The *jus accrescendi* accrues *per mortem*; the right of the devisee is *post mortem*. Had the estate been made before marriage, the husband and wife had been joint-tenants, and remained such after marriage, seized of their respective moieties; and had it been a limitation to them for their lives, contingent remainder in fee to the survivor, they had been seized *per tout* and not *per my* of their life estate, and then the husband could not by any alienation have destroyed the life estate, and so not such remainder depending on it.

2 W. Bl. 695,
Denn v. Hobson & al.

§ 43. Limitation in a settlement by feoffment, January 1630, by William Creswick, on his marriage to the use of himself and Sarah, his intended wife, for their lives, with survivorship; remainder “to the use of the heirs of the said William on the body of the said Sarah, lawfully begotten or to be begotten, the male to be preferred to the female, and the elder before the younger.” Held, an estate tail in the first instance.

1 W. Bl. 607,
Gulliver v. Ashby, numerous cases cited.—5 Bac. Abr. Am. ed. 804, &c. many cases.

§ 44. It is not a conditional limitation where a devise is to the heir at law in tail, with a proviso for taking the testator's name. It was urged, if not a condition precedent, it was a conditional limitation, the taking the name, the breach of which devested the estate and not a condition subsequent, of which none can take advantage but the heir at law. Held, a condition subsequent, and not a limitation; by Lord Mansfield, “a condition when annexed to an estate in fee, is meant to be compulsory; but when annexed to an estate tail, cannot be so meant, but merely as an intimation of his wishes; because the donee may bar the estate tail when he pleases, and the condition perishes with it.” Yates, Justice, viewed the taking the name as a mere recommendation. Hewitt J.,

“There are two cases in which the words of condition always operate as a limitation : 1. Where there is a devise over, in case of non-performance: 2. Where the heir at law is devisee.” CH. 125.
Art. 5.
As to a devise over, were cited, Porter v. Fry, 1 Vent. 199 ; Page v. Hayward, Pigott, 176 ; Salk. 570 ; Rundale v. Ealey, Cart. 171 ; as to devise to the heir, Wilcock v. Hammand, Cro. El. 204. Ch. 135, a. 2, s. 19.

§ 45. In a settlement of the wife's estate, it was limited to her for life, remainder to her husband for life, if any issue of the marriage so long live, remainder if she died without issue, of one moiety to him in fee, and of the wife's relations. Held, his remainder in fee did not arise, but in case he survived his wife. 1 W. Bl. 638,
639, Moorhouse v. Wainhouse.

§ 46. This was a limitation to A for ninety-nine years, if he lived so long, “ and from and after the death of A, or other sooner determination of the estate, limited to A for ninety-nine years, then to trustees during the life of A to preserve contingent remainders, and after the end or other determination of the said term, then to the first son of the body of A in tail male,” with divers remainders over ; A with his son B levied a fine and suffered a recovery, and both died. Held, the limitation to B was a good limitation : 2. That the limitation to the trustees was a vested remainder : 3. That the freehold was in them when the fine was levied : 4. Therefore the fine did not make a good tenant to the *præcipe* : 5. The recovery did not bar either the remainder to B or the subsequent remainders. In this case Willes C. J., in delivering the opinion of the judges in the House of Lords, stated the two sorts of contingent remainders which do not vest : Willes, 327,
343, Parkhurst v. Dormer in error.

First. “ Where the person to whom the remainder is limited is not in *esse* at the time of the limitation :

Second. When the commencement of the remainder depends on some matter collateral to the determination of the particular estate.” An instance of the first kind is a limitation to A for life &c., remainder to B's son when he has no child : 2d kind, a limitation to A for life, remainder to B after the death of J. S. or after a third person shall come from Rome, all conditions precedent ; see Boraston's case. A fine is not a feoffment of record,—the reasons &c.

§ 47. In a limitation to the heir of A, the person to take must be heir of A alone. If an estate be limited by deed to husband and wife, and the heirs on the body of the wife by the husband to be begotten, both have an estate tail. But if the remainder be limited to the heirs of the body of the wife by the husband to be begotten, the estate tail vests in the wife only. Decided on a covenant to stand seized, and on the ancient authorities. Buller J. said, “ the limitations of real pro- 2 D. & E.
431. 435,
Dunn v. Gil-
lot & al.—Lit.
s. 28.—4
Cruise, 448.

CH. 125. perty are in general technical." Settled, he said, if an estate
 Art. 5. be limited to one for life, "with remainder to the heirs of the
 body of the same person, it is an estate tail; but the limitation
 of the remainder must be to the heirs of the body of that person
 alone." "Therefore, if the estate be to A for life, remainder to
 the heirs of the bodies of A and B, it is not an estate tail." This
 rule is plain, for he who takes by limitation takes by descent, and
 one never can take an estate by descent from two when one of them
 had nothing in it. It seems using the words *heirs of the body of the
 wife*, her heirs of her body only are intended. But using the words,
the heirs on the body of the wife by the husband begotten, the word *heirs* is used
 indifferently of both, and "is not limited to the one more than the
 other." The same principle governed in the case of *Gosage v. Taylor*;
 same principle in the case of *Merrel v. Rumsey*, 3 Salk. 338, limitation
 was to the heirs of the body of the wife by the husband to be
 begotten, remainder to her surviving him, for life,—estate tail
 executed in her.

1 Ld. Raym. 496, *Trevivian v. Tooker*. § 48. Limitation by feoffment to A's use for life, remainder
 as to part of the estate to B's use for life, and after their deaths
 to C's use. Held, C took immediately on A's death so much of the
 estate as was not included in the limitation to B, though B was then
 alive.

3 Salk. 337, *Lee v. Bray*. § 49. Limitation by feoffment to the use of the feoffor's
 son and his heirs, and for want of issue of him remainder over,
 is an estate tail, on a well settled principle, that the latter words,
issue of him &c. restrain the prior more general words, *his heirs
 &c.*

1 East, 452, *Brudenell v. Elwes*. § 50. A limitation of an estate to one not born for life only,
 but not to the issue of such a one for life. And Lord Kenyon said,
 "an unborn child may be made tenant in tail, but not tenant for
 life with a limitation to his children as purchasers;" for this last
 limitation involves a double contingency.

2 H. Bl. 46, 63, *Goodright v. Rigby*. § 51. Lands were limited in a marriage settlement to A for
 life, remainder to B for life, with intermediate remainders; remainder
 to the heirs of the body of B. A became a bankrupt, and by an act of
 parliament passed to vest his estates in trustees for the payment of
 his debts &c., the lands in question were given after payment &c. to
 B for life with such remainders over (in general terms of reference)
 as were limited by the settlement. Held, under these circumstances B
 had a vested estate tail of which she might suffer a recovery.

2 H. Bl. 594, 600, *Owen v. Smith*, cited 4 Cruise, 451. § 52. This was a limitation in a deed to the use of A for
 life, with remainder to first and other sons of the body of A,
 lawfully issuing, and for default of such issue to the second, third,
 and other sons of A, and of the several heirs male of the body and
 bodies of all and every such son and sons respectively issuing,
 gives an estate in tail male to the first son of A.

53. A possessed of lands for a term of 999 years, previous to his marriage with B, granted the term "to B and her heirs immediately after the death of A, to hold the same to the said B and her heirs, to and for her and their own proper use forever." The marriage was had and the wife died first, and A died without issue and intestate, not having administered on her estate. Held, on A's death the term went to his administrator, and not to the administrator of B,—the court construed the grant to her a limitation to take effect only if she survived him.

CH. 125.
Art. 6.

1 H. Bl. 535,
540, Doe v.
Polgreen.

§ 54. Limitation by deed and fine of an estate to the use of the husband for life, remainder to trustees and their heirs during his life to preserve contingent remainders, remainder to the wife for life, remainder to trustees and their heirs in trust to support contingent uses and estates in the deed after mentioned, remainder to the first and other sons in tail, remainder to the wife in tail, and in default of issue to such persons and such estates as she should appoint: and held 1. The trustees took a legal estate in fee after the determination of the wife's life estate: 2. All the subsequent limitations were trust estates: 3. An appointment by her to the use of the husband's right heirs could not unite with a prior life estate: but 4. Could only give an equitable estate to the person who at his death should answer the description of his right heir.

7 D. & E.
438, Venables & ux. v. Morris, cited
4 Cruise, 36,
479.—1
Cruise, 460.

8 D. & E.
516.

§ 55. Tenant in tail may by bargain and sale, by a lease and release, or by a covenant to stand seized, convey a base fee which will not determine until the issue in tail enters, and he may convey an estate which by possibility may not take effect until after his death; but he cannot convey an estate which is not by the terms of a conveyance to take effect until after his death, unless such estate is limited to arise out of another which has continuance afterwards.

2 Ld. Raym.
778, Machill
v. Clarke.

ART. 6. *Estates that will descend.*

§ 1. Every kind of interest or right whatever a man has in an estate of inheritance in him will descend on his death to his heirs, if he have any. On the other hand, no estate a man has whatever for his own life only, or a less estate can descend. See art. 5, s. 35.

Watkins of
Descents, 1
to 74.

§ 2. If A have a remainder of an inheritance vested in him or contingent, it descends to his heirs on his death whenever not disposed of by him. The same is the case of an executory devise, or fee expectant, or a mere possibility. In exchanges, if both parties died before either entered, the exchange was void at common law. But if one entered and the other died before entry, yet his heir might enter and he should be in by descent. So if "a devise be to A in fee, and he dies

10 Mod. 419,
Marks v.
Marks.—
2 Mass. R.
67.—1 Stra.
129.—
2 Cruise, 453.

CH. 125. after the testator and before entry actually made, yet his heir may enter, and shall take by descent, though the devisee had but seizin in law."

Art. 6.
Co. Lit. 9.—
8 Co. 146,
156.

§ 3. Fish at large in a pond, and doves in a dovehouse descend to the heir, but not those that are caught, they go to the executor or administrator,—these are severed.

§ 4. The kind of estate that will descend is well described in Massachusetts statute of March 12, 1806; that is, "any lands, tenements, or hereditaments," of which the intestate dies seized, or "any right thereto," or "any interest therein" he may be entitled to in fee, simple or for the life of another not devised, so that by this act as by former laws a naked right in lands in fee, or for another's life will descend. And this right has been construed to include mere possibilities, conditions, and every sort of right or interest a man can have extending beyond his own life, and not disposed of by some act of his. A vested remainder is of course devisable. 6 East, 336, *Lewis v. Walkers*.

Ch. 127, a. 3,
s. 12, a. 3, s.
4, &c.—

§ 5. But it is not every kind of right or interest one has that can be devised. The English and our statutes provide that every man seized in fee of lands &c. may devise them; but this does not mean actual seizin in the full extent of the expression, but includes also constructive seizin, as of remainders, reversions, &c. as appears by the following cases. 6 Cruise 28, 29. To make a good devise three attesting witnesses are absolutely necessary, 6 Cruise, 48; but may be written at several times; *Id.*

2 Fearn, 124. Sealing a will is not a signing.—
6 Cruise, 60, *Smith v. Evans*.—
1 Ves. jr. 13, *Ellis v. Smith*.—
Pow. on D. 35, *Baker v. Hackling*.

§ 6. In a settlement B is tenant in tail, remainder to A in tail male, with reversion to A in fee; A may devise this reversion to D, and it is good, and an immediate devise to D, though this reversion is after two estates tail: but this is on the ground that the tenant in tail entitled to the seizin and possession remains seized and possessed, and that he is not disseized; and thereby his estate and the reversions and remainders thereon displaced as they must be by such disseizin. And a reversion discontinued and turned to a right cannot be devised, and is so if the estate tail be discontinued.

3 D. & E. 488, *Ives v. Legg*, cited
2 Cruise, 283, 284.—
6 Cruise, 465.

§ 7. It is a general rule, that a reversion or a remainder vested may be purchased or conveyed, and so devised. In this case it was held, that on a devise to A for life, to B in tail, and to C in fee, C has a vested remainder that he may convey or devise, where there is no disseizin of the prior estates. A had an estate for life.

Salk. 232, *Badger v. Lloyd*.—
2 Fearn, 124.—
6 Cruise, 465.

§ 8. So "if a man be seized of a reversion after an estate tail, and devise the lands to another after failure of issue of tenant in tail, it is an immediate devise of the reversion expectant on the estate tail, and therefore good." Lands con-

tracted for when the will is made pass by it in equity. 6 **CH. 125.**
Cruise, 31. **Art. 6.**

§ 9. So a devise to S. of a remainder after several estates, and among others some in tail by implication, was held to be good. And the reason is, in all these and like cases such reversions and remainders on one or more freeholds for life, and one or more estates tail, are in fact vested estates, expectant only as to the possession; and such reversion or remainder is a present interest vested in the reversioner or remainderman, and only the actual possession and the enjoyment is postponed, is in fact a vested residue. Default of issue means never having issue, so limited to the ancestor's death. 6 **Wilmington v. Wilmington.**
Cruise, 473. **2 Fearn 126 to 130, Jones v. Morgan.—6 Cruise, 342, 401, 467, 475.**

§ 10. So in this case A married his niece B, and covenanted to settle lands to the use of A for life, remainder to trustees for 200 years, remainder to C, B's husband, for life, remainder to the first and other sons of C and B in tail; so to their daughters in tail, remainder to A's right heirs. And before any settlement made, A by her will recited the articles and devised the lands &c.—the absolute inheritance thereof to the use of the heirs of B's body by any other husband, and for want of such issue to A's nephew L. in tail, and several other remainders over, remainder to A's own right heirs; she died seized. C and B, his wife, entered and suffered a common recovery, in which they were vouched, to certain uses, B died without issue, and afterwards C died, and the question was between B's heir at law and L's daughter. And the court resolved that it was not necessary to decide whether the articles and will could be tacked together or not; for if a devise of the particular estates in them could not be implied, and supposing the devise to the heirs of B bad by a second husband and void, the limitation to L. could not be a contingent remainder for want of a preceding freehold or estate; and it was too remote as an executory devise, being only to take place on the indefinite failure of B's issue, and L. could have no title unless viewed as a present immediate devise to him, but this was not the construction, and he had no vested interest. But if the estate in B's issue had been good, the estate to L. had vested, though the articles and will did not unite, as it would have taken effect in possession after the deaths of C and B, without her leaving issue by a second husband, or if she had left issue would have vested in interest as a remainder on the estate tail then become vested in such issue. A mere right of entry is not devisable. 8 **East, 552.**

§ 11. As to other remainders vested, and so transferrable by devise, or other conveyance, before vested in possession, see *Doe v. Collis*, and many other cases before stat-

2 Burr. 873, Goodman v. Goodright.—2 Fearn, 133 to 142. Wills of trust estates are within the statute. 6 **Cruise, 72, Wagstaff v. Wagstaff.** So of monies to be laid out in lands, 73.—So wills made abroad, *Id.*—But of terms for years are not, *Id.*; except it be attendant on the inheritance, *Id.*—No use results on a devise. 1 **Cruise, 466.**

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2 Fearn, 124.

Mass. S. J.
Court, June
1791, Barker
v. Bodwell.



What is seizin to enable one to devise lands.

Our Proprietors in common recovered judgment; held,

ed. And as a remainder when it vests in possession, and has no estate before it, in fact it then ceases to be a remainder.

§ 12. B, tenant in tail, remainder to A in tail male, reversion to A in fee, a devise by A to his daughter T, is a good and immediate devise of, or out of his reversion.

§ 13. In this case one material question was made, as to what is sufficient seizin to ground a devise upon. This was a plea of land. The plt. declared on his seizin of one hundred acres in Methuen, within thirty years. A. D. 1669, Haverhill and Methuen formed one town, and lay in what was then called the county of Norfolk. By Haverhill town-books the lots were then laid out, and four hundred acres, (including said one hundred acres,) as the plt. said, were assigned to Stephen Kent, and extended to Satchell's corner, which the plt. said was at B, and the deft. said was at A. This was one question; for if at A the triangle of one hundred acres was not in Kent's grant, but if at B then it was in it. He sold to one Currier. His deed to four persons was lost, and was made before 1700. In 1700, these four persons sold one half to old Barker, one quarter to Bodwell, and one quarter to J. S. In 1725, Barker and these two persons divided, as appeared by the town-books of Haverhill. In 1747, old Barker made his will, proved in 1750, and devised the said one hundred acres to the plt. In 1748, several persons entered on this land and cut timber, and soon after paid the testator for it; this was deemed good evidence to prove his seizin, both when he made his will in 1747, and when he died in 1750. About 1770, the plt. entered and cut timber once; and this also was deemed good evidence to prove he was seized, though but once in the land for forty years, being woodland, and not wanted for cultivation. The defts. entered in 1790, just before the action was brought. Also held, that this want of Currier's deed to the four persons was not material; that the plt. need not trace his title back further than 1725, being more than sixty years. The evidence of the testator's seizin, in 1725, was then his recording his deed of partition; and the court held, this good evidence of his seizin at that time against strangers, but not evidence of seizin as against an adverse possession. Also held, the plt's. seizin was evidence of a colourable title, at least, and was sufficient to enable him to recover against the defts. who only had made a very late entry, and had possession a very short time.

§ 14. In this action the plt. claimed under the proprietors of Haverhill, who, in the town's name, lotted the lands in

1669. The defts. offered to shew that these proprietors about 1750, recovered said lands from Barker, and that the defts. held under this judgment by several conveyances ; but the defts. were not allowed to introduce this judgment, till they first traced their title to it, to shew they were privy to it, and so had a right to introduce it. This they failed to do. A. D. 1779, depositions in *perpetuum* were taken as to Satchell's corner, a material boundary. Those of the deceased deponents were read ; those of the living ones were not. So Lad and others, witnesses on the stand, were allowed to testify what old people, dead at the time of the trial, had told them respecting this boundary.

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Art. 6.

Hearsay evidence as to boundaries.

§ 15. In this case it will be observed, that the testator was held to be seized of this woodland, so as legally to devise it, though it lay in the town where he lived, and though there was no evidence of his seizin or possession, but his recording his deed of partition of it in 1725, and some persons cutting trees on it in 1748, and paying him for them. Yet there was no doubt but that he had sufficient seizin to enable him to devise the land ; and mainly, because there was no evidence of any seizin or possession adverse to his ; and he generally appearing to have the right of property ; the law deemed him to be seized on the general principle that seizin follows the right of property, wherever not separated by an actual adverse seizin ; and if he had clearly proved his right of property, on this principle, he would have been adjudged seized, though there had been no such evidence of seizin, as no opposed seizin or possession was proved. On this principle our wild lands have ever been devised and conveyed ; the devisor has ever been allowed to devise them when he has had no evidence of property or seizin in them, but his deed, or a devise, or descent from another ; and when there has been no evidence the devisor was ever on or near the lands, because his title has necessarily drawn to it seizin and possession in law, wherever no adverse possession has appeared. See Seizin, in a former chapter.

Seizin of our wild lands, so as to devise them.

§ 16. So if A and B be tenants in common, co-parceners, or joint-tenants, and A has remained in possession, taking the profits, and not denying B's right, but expressly or impliedly admitting it, he is and has been such part owner. B may devise his part, and in law has actual seizin and possession ; because in law the seizin of A is that of B ; and this though B has never in fact himself been in possession for twenty, thirty, or forty years ; and so invariably has been our practice.

Where a tenant in common &c. may devise though not taking any profits.

§ 17. So where our land corporations, formed on our justices' warrants, have in fact had the actual seizin, possession, and the management of the lands ; and have been taxed for

Even in our land corporations.

CH. 125. them ; the individual proprietors, in common and undivided,
 Art. 7. have invariably had a right to devise or convey their undivided parts, when estates of inheritance. So the Kennebec Proprietors, as a corporation, have been in the actual seizin, possession, and management, of their undivided lands above sixty years, having been taxed for them, have brought actions of trespass for trespasses on them, yet the individual members or proprietors have and do invariably devise and convey their respective parts of the undivided land, whenever they please, though as such individual proprietors they have never been upon or near these lands, for a century past, if ever ; and on the clear principle, that their seizin, possession, and management, of the lands, by the corporation, is, and has been, the seizin and possession of each individual proprietor, in construction and contemplation of law.

3 D. & E. 88
 to 98, Jones
 & al. v. Roe,
 lessee of Perry,
 in error.

§ 18. The principle settled in this case was, that a possibility coupled with an interest may be devised. See Ch. 104, a. 2 ; and fully stated, Ch. 114, a. 22. The testator in this case could hardly be said to be seized of a possibility so coupled, or as having the land. 1 H. Bl. 30 ; 4 D. & E. 605 ; 1 Wils. 169.

2 Wils. 29,
 35, Goodright
 v. Searle & al.
 —And. 88.

§ 19. An executory devise in fee, is like to, though not a contingent remainder, and is transferrable to the heirs of the executory devisee, who dies before the contingency happens. An executory devise is made good but to aid the intention of the testator. See 3 D. & E. 488, n. ; 6 Cruise, 523, 524, several cases.

ART. 7. *Several cases as to devises.*

5 Burr. 2703,
 White & al. v.
 Barber & al.

§ 1. *The devisor's manifest intent is to be regarded, though there be a defect of expression to the purpose.* As where he had but one son, Thomas, when he made his will, and devised to him in fee ; but added, if his wife should be *ensient* with one or more children at his decease, and Thomas should die without issue before twenty-one, such child or children being then alive, then when twenty-one to them in fee ; and if such, and also Thomas, all died under twenty-one, and without issue, then to several nephews. Testator had after making his will, and before his death, two more sons, Edward and John, (the plts.) He died without altering his will, leaving said Thomas, Edward, and John, his three sons, his wife not *ensient*, and Thomas died without issue. Edward and John were not provided for, if not in this will. Held, they took under it, though there were in it no words that included them ; yet on the whole will it was manifest the testator meant his estate should not go to his nephews whilst he had children living ; and words may be supplied in a will to make a clause complete and intelligible, in aid of the apparent intent of the testator.

4 D. & E. 82.
 —8 D. & E.
 6.—6 East,
 486, &c. Doe
 v. Micklem.

§ 2. A debt forgiven by will is not a lapsed legacy if the debtor dies before the testator, where the debtor is one of his family, though the debt would be assets as to creditors; but not to be demanded as to the executor, "who is a volunteer." And if he were to sue at law, chancery would grant an injunction.

CH. 125.
Art. 7.

1 Wils. 178,
in Chan. Sib-
thorpe v.
Moxholme.
1 Wils. 238,
Bagshaw v.
Spencer; cit-
ed 6 Cruise,
337, 338.

§ 3. Material difference in chancery between trusts executed and executory. Executory.—A court of equity sometimes departs from the words of the will, in order to direct a conveyance to be made which will answer the intention of the testator. The word *issue*, in a will, is a word of limitation; in a deed, always of purchase. *Heirs of the body*, in a will, of limitation, but often may be construed of purchase, to effectuate the testator's intention. A devise to A and his heirs, upon trust to convey to B, and the heirs of the body, is a trust executory; and the court will make *heirs of his body*, words of purchase; but a devise to A and his heirs, in trust for B and the heirs of his body, is a trust executed, and B will have an estate tail. In contemplation of law, all trusts were executory before the statute of uses, which has executed many of them, which thereby have become legal estates. With these chancery does not interfere; hence to bring a trust within its jurisdiction, it must be executory. "But where a trust is executed, the testator has left nothing for a court of equity to do."

§ 4. *Case of intention, &c.* The testator had a daughter, and devised to a son *in ventre sa mere*, &c. when he attained twenty-one; but if a daughter, then one moiety to his wife, and the other to his two daughters when twenty-one, with survivorship between the two; but if both died before twenty-one, their moiety to his wife and her heirs forever, and if she died, her share to go to them. She was not *ensient*. Testator died, so did his daughter, without issue, and under age. The wife took the whole estate. It was the plain intention of the testator; not like the great case of *Jones v. Westcomb*.

Cowp. 40, 43,
Statham v.
Bell.—1
Doug. 66.—
6 Cruise, 506.


§ 5. Description of the thing devised mistaken, yet passes, as where the county is mistaken in which the land devised lies. *Hastead v. Searle*, see *Boundaries*; and 6 Cruise, 188, &c.

1 Ld. Raym.
728.

§ 6. *The introductory words in a will—their effect.* Though they have some effect in construing a will, the words expressing the testator's meaning to devise all his estate cannot be construed to extend a devise for life to a fee. See *Goodright v. Stocker*, *Baddeley v. Leppingwell*, &c. In this case, by seven judges against one, a rule of law controlled the testator's intention, which was a fee, but not using words to that effect,

5 D. & E. 13.
—6 D. & E.
612.—8 D. &
64.—New R.
335, 346,
Doe v. Child
& al.
Many cases
cited, 6
Cruise, 158.

CH. 125. held, only an estate for life, though he as to all his worldly estate in the introduction &c. devised it as follows &c.: he devised to his wife for life all his estates, then remainder to one son, his lands in Essex, held only for his life; remainder to another son, his estate in Huntingdonshire, held a fee; twice argued A. D. 1804 and 1805. See *Denn v. Gaskin*, *Grover v. Pues*, and many cases, Ch. 128. See also, s. 10 post.

Ch. 126, a. 3. *Art. 7.*  *§ 7. Per capita and per stirpes.* A devised a reversion to S. T. and A. L. as tenants in common in fee, and if both or either died, living T. Hewitson, (tenant for life,) then the share or shares of her or them so dying to go "unto all and every such child and children, grandchild and grandchildren of the said S. T. and A. L. respectively, as should be living at the time of her or their decease, and to the issue of such of them as should be then dead and have left issue, and to his, her, and their respective heirs, as tenants in common; yet nevertheless so as all the descendants of the said S. T. should together be entitled only to one moiety of the said premises, and all the descendants of the said A. L. should be entitled to no more than the other moiety thereof; and that none of such descendants, either of S. T. or A. L. should be entitled to any greater or other share of the said respective moieties of the said respective premises than his, her, or their father, or mother would have been entitled to if living." Held, under this devise the grandchildren of S. T. and A. L., though in *esse* at the date of the will, could only take *per stirpes*, and not *per capita* in substitution of such of their parents respectively as happened to be dead at the determination of Thomas Hewitson's life estate.

6 D. & E. 610, *Doe v. Buckner*.—3 Bos. & P. 376, &c.—Cro. El. 674. *§ 8. Words in a will that include or exclude certain kinds of property.* One bequeathed £4,000 to A and B, in trust for certain persons; then "all the rest of his estate and effects of what nature soever to A and B, their executors and administrators, in trust, to add the interest to the principal so as to accumulate the same, it being his will the residue be paid," but as the £4000 was to be paid. Held a house, his only freehold estate, did not pass, though the words, "as to all his estate and effects both real and personal," were in the introduction, and the word *estate* in the residue. Roll. Abr. 612, 613; 8 D. & E. 579; 8 East, 91.

3 Bos. & P. & P. 172, *Kenrick v. Beaucherk*.—Skin. 130. 3 Bos. & P. 376, *Roe v. Walker*.—5 D. & E. 716.—1 East, 33.—1 East, 501.—Allen, 28.—2 D. & E. 498, *Doe v. Mod.* 228. See also, 2 Vern. 461, 659, 621.—1 Wash. 262.—See Ch. 127, a. 16.

with all lands, goods, and chattels whatever and wherever for her life, and after her death to two younger sons till fifteen, for their education, then he devised his house, goods, and chattels, equally between his sons and daughters; held, the lands did not pass to them, sons, &c. The word *legacy* may apply to real estate, if so the intent appear in the will. The words, "*said effects*," include real estate when that is a part of the preceding subject. So *his share* includes a leasehold estate when his share before in the will included such estate. So the devise of a house will include every thing occupied with it by the devisor, as proper and convenient for the occupation of it, though the word *appurtenances* be not added. As a devise of a "house and gardens to B. I live in;" held, the stables and coal-pen the testator occupied with the house passed with it, though he used them for the purposes of trade, as well as for convenience to his house. These and many other such cases depend on the testator's intentions. See also, 6 D. & E. 345, what passes under the word *farm*; 1 Bos. & P. 53, what under "messuage with the appurtenances;" 2 Bos. & P. 303, what under a general devise of all messuages, lands, tenements, and hereditaments,—leasehold messuages pass not, unless evidently intended. 3 East, 552, words that vest in trustees only the personal estate, though the words *estate* and *effects* were used; see 5 East, 162; and New R. 116; also held, a devise of the testator's stock on his farm, and all other personal his estate to his executors to pay debts &c.—stock on his farm included the corn growing there at the testator's death, and executors had it, and not the devisees of the land, though not wanted to pay debts &c. See Cox v. Godsalve, Ch. 76, a. 6, s. 4; and 9 East, 448; see also 8 Johns. R. 59,—strong case. All the testator's moveables do not include debts due to him.

CH. 125.
Art. 7.

8 East, 339,
West & al.
exrs. v.
Moore.
Quære.—2
Dallas, 142.

§ 9. *Those next of kin at the testator's death take &c.* As where he devised to his natural son, and if he married with certain persons, or died without issue, then to the testator's nephew A for life, and after his death among such person or persons in fee as should be proved to be his next of kin, in such proportions as they would take his personal estate on the statute of distribution if he died intestate. The distribution must be among those the testator's next of kin at his death, though A be one of them, having said life estate, and not those the testator's next of kin when the natural son's estate ended, and then interests vested. See Ellison v. Airey, 1 Ves. 114; Rayner v. Mowbray, 3 Bro. Chan. Cas. 234; Masters v. Hooper, 4 Bro. 207; Baldwin v. Karver, Ch. 114. It is clear, that only those who were the testator's next of kin at the time of his death could take in said statute proportions.

3 East, 278
Doe v. Law-
son & al.
Many cases
cited, Cro.
El. 423.—
2 Atk. 329.—
5 Ves. jr. 399.
—1 Hen. &
M. 212.—
2 H. Bl. 399.

CH. 125. But an infant in *ventre sa mere* is considered as born for all purposes for his benefit. *Doe v. Clark*.

Art. 7.

9 East, 267,
Right v.
Campton.

§ 10. *Distinct devises in a will—special terms of one aid not in the construction of another.* That is, where there is no connexion by grammatical construction, or direct words of reference, or by the declaration of some common purpose, one clause cannot be drawn in aid in the construction of another; though in its general terms and import similar, and applicable to persons standing in the same degree of relationship to the testator; and there being no apparent reason other than the different wording of the clauses to presume the testator had a different purpose in view, especially when the part in question is perfect in itself, and without ambiguity.

3 Johns. Cas.
174, Denn v.
Cornell.

§ 11. *Where the heir is estopped by a recital in a will to deny a title.* The testator in his will recited, "whereas I have conveyed to my son C, my lands at C, and to my son D my lands at F, I give and devise all my remaining lands and tenements and real estate whatsoever to my sons C and D, and my daughter." Held, this recital proved a conveyance in fee of the farm in F to D; and C, the testator's heir, was estopped by this recital to deny such conveyance; also held, a fee was to be intended.

7 Johns. R.
394, 399,
Jackson v.
Holloway.

§ 12. *Ineffectual alterations in a will do not invalidate it.* As where one devised all his lands he possessed to his four sons, and afterwards became seized of other lands, and by erasures and interlineations, he altered his will so as to include all the lands of which he should die seized, and endorsed a memorandum to that effect on the will, stating the alterations. This memorandum was attested but by two witnesses only, so ineffectual to the purposes of another will or of a codicil. Hence held, the interlineations and erasures did not destroy the original will, and the lands acquired after its date did not pass by it.

1 Salk. 228,
South v. Al-
len.

§ 13. Devise of rents and profits to A to be paid by the executors, is a devise of the lands to A; and being a devise to Sarah Birch for life, held, she had the lands themselves.

Loft, 207,
Campbell v.
Vaughan.

§ 14. Lord Mansfield said, the best rule in construing wills is to ascertain the testator's general intent; then, as far as grammar and language will allow, accordingly to explain particular expressions.

New R. 313,
Bromfield v.
Crowder &
al.

§ 15. *Vested devise &c.* One devised to A for life, and after her death to B for life, and after the death of both, devised all his estate to C in case he lived to twenty-one, but if he died before twenty-one, and D survived him, then to D, in case he lived to twenty-one, but not otherwise; but if C and D both died before twenty-one, then to E in fee. Held, C took a vested remainder. This cause was twice argued; C

was plt. ; and objected the remainders to him, D, and E were respectively contingent remainders, to vest not until each arrived to the age of twenty-one, and as the life estates of A and B whereon such contingent remainders vested, terminated before C arrived to twenty-one, his said remainder failed. The testator gave the deft., the heir at law, £50 for his life, and if he disposed of any part, the same should cease. But it was decided the testator did not mean C, the plt., (John Davenport Bromfield) should take the estate as an immediate devise, but to go over if he died under twenty-one. "No precise words are necessary to constitute a condition precedent in wills;" "they must be construed according to the intention of the parties." "The apparent intention as collected from the whole must always control particular expressions." "In this case there is a variance between the expression and the meaning, and the case of *Edwards v. Hammond* sanctions us in giving effect to the latter;" and the words, *all my estate*, gave the plt. a fee. Other cases, 2 Johns. Cas. 314 ; 2 Johns. R. 288 ; 4 Johns. R. 61 ; 1 Dallas, 8.

CH. 125.
Art. 7.

1 Salk. 229.
—5 Mass. R.
535.—
8 Mass. R.
458.

§ 16. *Lapsed devise &c.* Ch. 43, a. 3 ; Ch. 127, a. 10. A bequeathed monies to trustees in trust for B, her only daughter and child twelve years old, till twenty-one, and then to pay the same to her, and if she died under twenty-one, leaving a child or children, then in trust therefor ; but if B died under twenty-one, leaving none, then in trust for C's three nieces. B attained twenty-one, married, had two children and died in the life time of the testatrix. Held, B's children took nothing by the will. Said two children were plts., and one of the nieces deft. The estate was to pass to the children of B, if she died under twenty-one leaving children ; but, said the court, she did not die under that age,—“we cannot make a will for the testatrix.” B's devise was a lapsed one, the whole was given to her if she attained twenty-one, and she attained that age.

4 D. & E.
706, Doe v.
Brabant.

This was a devise to Margaret, only child, for life, remainder to the first son of her body, “if living at the time of her death,” and the heirs male of such son, and for default of such issue male remainder to A. Devisor died May 24, 1729 ; Margaret, heir at law, entered, and June 1737 married the grandfather of the plt's. lessor, had one son, plt's. lessor's father, which son died December, 1783, in her life time, leaving issue, also heir at law. If Margaret's son had survived her, he would have had an estate in tail, but as he did not, it failed, and the estate went over to nephews, though a lineal heir at law was living claiming as such, or such estate in tail, because the court felt itself bound by clear apt words in the will. And Lord Kenyon, “if by accident the person who

6 D. & E.
512, Denn v.
Bagshaw &
al. Many
cases cited.

CH. 126. is to take as tenant in tail under a will, die in the life time of the devisor, the remainder over takes place immediately."

Art. 1. This estate tail is lapsed and gone by such death.

1 Dallas, 183,
Bloomfield v.
Budden.

§ 17. *Division of a house sold, as to tenant for life and those in remainder.* The testator devised after paying debts, a house to his wife for life, remainder to his children; the widow and children mortgaged it for the proper debt of one of the children, and the house was sold to pay the mortgage money: held 1. The surplus be paid the widow on security her executors after her death should account for it to those in remainder: or 2. If such security was not given, then it should be paid to those in remainder, they giving security to pay the interest to the widow during her life. This was an equitable arrangement, but it will be observed it was made by a court of law.

4 D. & E.
601, Doe v.
Kitt. See a.
5, s. 38.

§ 18. *Lapsed devise.* The devisee dying in the testator's life time, though he republish his will after he knows of the death. As where A devised to B and the heirs of her body, B died in the testator's life time, leaving a son; the testator knew of B's death and her son's birth, and made a codicil that operated as a republication of his will; held, the son took nothing.

§ 19. Wife's devise to her husband is void, Kirby, 195; a devise to A and the heirs of her body is a fee tail; Id. 118: to A and his male heirs forever, so that the land remain in the name of A forever, is a fee simple; Id. 175. So is a devise to A, her heirs and their assigns forever. 1 Day's Ca. 299.

CHAPTER CXXVI.

ESTATES BY DESCENT, ON MASSACHUSETTS STATUTES.

ART. 1. *Colony and Province statutes.*

Colony Law,
C. & P. Acts,
205.—Maine
Act, ch. 38.

§ 1. These statutes have been enacted and revised from time to time, with some but not considerable alterations. The laws of the Colony were very imperfectly worded on this subject. But acts passed in 1644 and 1649, declared the eldest son should have a double share, and that the county court should "assign to the widow such a part of the intestate's estate as they shall judge just and equal;" also "divide to the child-

ren or other heirs their several parts and portions out of the said estate." And each county court had the probate of wills and granting of administrations. But as these were statutes of distribution, and referred to some prior law, no doubt that law was the statute of distribution in England with the above exception as to the widow and oldest son of the intestate. These ancient statutes are still important, as they make parts of our titles.

CH. 126.
Art. 1.

§ 2. By this act the estate descended equally among the intestate's children, and the legal representatives of those deceased, taking advancement into view, excepting two shares descended to the eldest son, and if no sons, the daughters inherited (as by the Colony law,) as co-parceners, and if any child died under age, or unmarried, "the portion of such deceased child shall be equally divided among the survivors;" [this was not altered by the 9th of Anne, below;] and if no children, or representatives of them, the estate descended "equally to every of the next of kin of the intestate, in equal degree, and those who legally represent them. No representatives to be admitted among collaterals after brothers' and sisters' children."

Prov. act of 1694.—Mass. Laws. App.

See a. 3, s. 18.—The father of such child could not inherit its said portion, 15 Mass. R. 292.

§ 3. This act provided, that if a child was born after the death of his father, and had no provision in his will, it was allowed a share in his estate in the manner it would have done if he died intestate.

Prov. act of 1700.—Mass. L. App. 986.

§ 4. This Province act provided, "that if after the death of the father, any of his children shall die intestate without wife or children, in the life time of the mother, every brother and sister, and the representatives of them, shall have an equal share with her in the estate of the intestate."

9 Ann. A. D. 1710.—Mass. Laws, App. 995.—See a. 3, s. 18.

§ 5. This act provided, that if a child died in the life time of the intestate, leaving issue, such issue should take such child's part, it would have had if it survived the intestate, and the eldest son, among such issue, had a double portion, and such deceased child's portion was settled "in the same manner and proportion as if the same had descended from their immediate father or mother."

Prov. act, 1734.—Mass. L. App. 1010.

§ 6. The act of 1784 enacted, "that when any person died seized of any lands, tenements, or hereditaments, not by him devised, the same shall descend, in equal shares, to and among his children, and such as shall legally represent them, (if any of them be dead,) except the eldest son then surviving, who shall have two shares, if there is no issue of an elder son, in which case such issue and lineal descendant or descendants of such issue shall have two shares in right of their father, although the father died before the grandfather." [By the act of June 8, 1789, in force June 1, 1790, such eldest

Act March 9, 1784, & June 8, 1789; though the above acts were revised in 1806, yet very numerous titles must long be examined under them.

CH. 126. son or issue took but one share.] “ And in every case where
 Art. 1. children shall inherit by representation, it shall be in equal
 shares ; and where there are not children of the intestate,
 the inheritance shall descend equally to the next akin in equal
 degree, and those who represent them, computing by the rules
 of the civil law ; no person to be considered as a legal rep-
 resentative of collaterals beyond the degrees of brothers’ and
 sisters’ children : and for want of heirs, the estate shall accrue
 to the Commonwealth : and when any of the children of an
 intestate die before his arrival to the age of twenty-one years,
 and unmarried, such deceased child’s share shall descend
 equally among the surviving brothers and sisters, and such as
 legally represent them ; but if after having arrived to twenty-
 one years of age, unmarried and intestate, in the life time of
 the mother, every brother and sister shall inherit equally with
 the mother.” The act did not give a share to the issue of
 one dying of age. See a. 2, s. 2.

See a. 3, s. 18.

Mass. Act,
 May 12, 1806.
 —Maine Act,
 ch. 38 s. 17,
 18, 19.

§ 7. By this act it is enacted, “ that when any person shall
 die seized of any lands, tenements, or hereditaments, or of
 any right thereto, or entitled to any interest therein, in fee
 simple, or for the life of another, not having lawfully devised
 the same, the same shall descend in equal shares to his child-
 ren, and to the lawful issue of any deceased child, by right of
 representation, and when the intestate shall have no issue, the
 same shall descend to his father ; and when there shall be no
 issue nor father, the same shall descend in equal shares to the
 intestate’s mother, if any, and to his brothers and sisters, and
 the children of any deceased brother or sister, by right of rep-
 resentation ; and if the intestate shall leave no issue, father,
 brother, or sister, then the same shall descend to his mother,
 if any, but if there be no mother, then to the next of kin in
 equal degree ; the collateral kindred claiming through the
 nearest ancestor, to be preferred to the collateral kindred
 claiming through an ancestor more remote, and the degree of
 kindred, in all cases, to be computed according to the rule of
 the civil law ; and when there shall be no kindred, the same
 shall *escheat* to the Commonwealth, for the want of heirs,
 saving always to the intestate’s husband, his tenancy by the
 curtesy, and his widow her dower, at the common law, unless
 she be lawfully barred of the same ; provided however, that
 when any child shall die under age, not having been married,
 his share of the inheritance that came from his father or moth-
 er shall descend in equal shares to his father’s or mother’s oth-
 er children then living respectively, and to the issue of such
 other children as are then dead, if any, by right of represent-
 ation ; and provided further, that when the issue, or next of
 kin to the intestate, who may be entitled to his estate, by vir-

Escheat is
 only of what
 lies in tenure,
 3 Cruise, 499,
 500, not of
 trust estates,
 id. 521, 522.
 Is a new pro-
 vision, see
 below.

tue of this act, are all in the same degree of kindred to him, they shall share the same estate equally, otherwise they shall take according to the right of representation." [So was the practice on the former statutes.]

CH. 126.

Art. 1.

§ 8. Section 2d enacts, "that when any person shall die possessed of any personal estate, or of any right or interest therein, not lawfully disposed of by last will, the same after allowing to the widow, if any, her wearing apparel, according to the degree and estate of her husband, and such further necessities as the Judge of Probate shall order, regard being had to the state of the family under her care, shall first be applied to the payment of the intestate's debts, with the charges of his funeral, and of settling his estate; and the residue, if any, shall be distributed among the same persons in the same proportion, to whom the real estate shall, by virtue of this act, descend: provided however, that the husband of the intestate shall be entitled, in all cases, to the whole of the said residue: and further, that if the intestate shall leave a widow and issue, the widow shall be entitled to one third part of the said residue, or if there be no issue, to one half part thereof; or if there be no kindred to said intestate, then she shall be entitled to the whole of the said residue: and provided further, that when there shall be no husband, widow, nor kindred, to the intestate, the whole of the said residue shall *escheat* and *enture* to the Commonwealth."

May assign the whole to her if not extravagant, 15 Mass. R. 183. —Stat. 1816, ch. 95.

§ 9. Section 3d enacts, "that all gifts and grants made by the intestate, to any child or grandchild, of any estate real or personal, in advancement of the portion of such child or grandchild, and which shall be expressed in such gift or grant, or otherwise charged by the intestate in writing, or acknowledged in writing by such child or grandchild as made for such advancement, such estate, real or personal, shall be taken and estimated in the distribution and partition of the intestate's real and personal estate as part of the same, and the estate so advanced shall be taken by such child or grandchild, towards his share of the intestate's estate; and the value at which such estate shall be so taken shall be the same as above expressed or charged by the intestate, or acknowledged by the child or grandchild, if any value be so expressed, charged, or acknowledged, otherwise at the value thereof when given."

§ 10. Section 4th enacts, "that in the distribution of the personal estate, pursuant to this act, alienage in the person claiming a distributive share thereof, as issue, widow, or otherwise, shall be no impediment to such person's receiving the same, any thing in this act to the contrary notwithstanding. But this provision is not to extend to the descent of any real estate to an alien."

CH. 126.
Art. 2.



§ 11. Section 5th enacts, "that all the lands, tenements, and hereditaments, of which the intestate died seized, and also all such estate which he had fraudulently conveyed, or of which he had been colourably or fraudulently disseized, with intent to defraud his creditors, shall be liable for the payment of his debts, and may be recovered and applied thereto, in the manner by law directed, wherever the personal estate shall be insufficient therefor; saving to the widow her dower therein, except in the estate so fraudulently conveyed, to which she had legally relinquished her right of dower."

§ 12. Section 6th enacts, "that this act shall be in force from and after the first day of July next, and that from and after that day, all acts and parts of acts, heretofore passed, so far as they come within the purview of this act, shall cease and have no further effect, excepting as to the estates of such persons who shall die before this act shall be in force."

4 Burr. 713.

§ 13. It will be observed that this important act was a revision of the former acts on this subject, and in some parts explanatory, as will appear by the following cases, and in some parts contains new provisions, to wit: as to father and mother, under prior laws, not being named, took as next of kin: 2. If a child die under age, never having been married, his share of the inheritance, that came from his father or mother, shall descend in equal shares to his father's or mother's other children then living, respectively, and to the issue of such other children as are then dead, if any, by right of representation; this is a new provision: 3. The power of the judge to allow the widow *necessaries* &c., is new. Seizin in this act is construed as it was understood in the former laws, to include any right or interest. So the last proviso in the first section is according to the former construction. So also, that the husband shall have the residue of his wife's personal estate. So as to estates fraudulently sold, or whereof the intestate has been fraudulently disseized, to wrong creditors. So alienage being no impediment as to personal estate. So in fact as to advancement, and a *posthumous* child is considered as one born at his father's death, and takes accordingly. Fraudulently conveyed must mean the purchaser is also a party to the fraud.

The Maine act does not embrace all the provisions of this act of 1806. —1 P. W. 486.—See a. 2, s. 5.

Sawyer v. Brindley, Feb. 1801, Boston.

3 Mass. R.

ART. 2. *Cases adjudged upon these statutes.*

§ 1. In this case the court held, that where one of the children of age died without issue after the death of the father, and living the mother, seized of any estate by descent or purchase, she took a share with the surviving brothers and sisters. And this case was recognized in Mayo v. Boyd, and there added it is consistent with the spirit, though not with the letter of the act of 1784.

§ 2. In this case it was decided, that the 9th of Anne, A. D. 1710, extended only to cases where before that act the mother had the whole as next of kin. The intention was to limit her interest and not to extend it. Also, in this case it was held, that by these words, "*such deceased child*," in the act of March 9, 1784, is to be understood the child of any deceased father : and that under the provision therein made, the surviving brothers and sisters, and not the representatives of any that are therein deceased, are to share the inheritance with the mother. Also in this case, *Mayo v. Boyd*, Thomas Quinby, in 1776, died seized of estate devised to him and of age, unmarried, intestate, and without issue. Held, his mother (his father being dead) had one share, his brother and sisters one each, and the sons of the deceased brother one, on the act of 9th of Anne. In a like case on the act of 1784, this last share has been excluded ; and from 1692 to 1710 the mother's case was on the ground of next of kin, except in regard to said portion of a minor child deceased, mentioned in the said act of 1692. These laws have been so often altered, and in many cases so badly expressed, that great care is necessary in tracing a family descent back 160 years.

CH. 126.
Art. 2.

3 Mass. R.
16, Mayo, assignee v.
Boyd. A. D.
1807.

§ 3. In these cases our court decided, that a child takes nothing by descent, if it be named or mentioned in the will of the testator, though no legacy be given to it, for being named it appears it was not forgotten by the testator, and that is sufficient to satisfy the statute, which meant to make provision only for cases of children forgotten, or omitted by mistake by the testator. See 14 Mass. R. 357.

1 Mass. R.
146, Terry v.
Foster.—
3 Mass. R.
17, Church v.
Croker.

§ 4. In this action it was decided, that the Judge of Probate has no power to settle lands assigned for dower, after the widow's term is expired, on one or more of the next of kin to the exclusion of others. In this case the judge assigned to two children, they paying the other six certain sums. The petitioner had taken on execution the share of one of them after the widow died.

4 Mass. R.
117, Hunt v.
Hapgood.

§ 5. This was a writ of entry, and the court decided, that when a child for a sum of money paid him by his father as an advancement, releases his claim to his share of the inheritance, though for much less than the value of his share in his father's estate at his death, such child is barred of his share or *purparty*. The advancement was made and the release given April 29, 1774 ; the father died 1804. This decision was grounded on the case of *Quarles v. Quarles*.

8 Mass. R.
143, Kenney
& ux. v.
Tucker.

By this act it is enacted, that all such estate, real and personal, that is not devised or bequeathed in the last will and testament of any person hereafter to be proved, shall descend or be distributed in the same manner as if it were intestate estate,

Mass. Act,
Feb. 6, 1784,
sect. 10.

CH. 126. and the executor or administrator shall administer the same as
 Art. 3. such. There often arises an interesting question on this
 clause, what estate is devised. For instance, the testator be-
 queaths \$20,000 to a voluntary society that cannot take; is
 this sum bequeathed or not, or shall it fall into the *residuum*
 bequeathed, and so go to the residuary legatees, or be viewed
 as not bequeathed, and be distributed accordingly? This will
 be considered in the next chapter.

10 Mass. R.
 437, Whit-
 man, appel-
 lant, from
 pro. decree,
 v. Hapgood
 & al.

§ 6. *Advancement.* Charles Whitman died intestate after
 July 1, 1806; May 5, 1798, he executed a deed whereby in
 consideration of love and affection he bore to his son C. W.
 the appellant, and his desire to see him comfortably settled in
 the world, he conveys to his said son certain lands, with cov-
 enants of general warranty. Held, this deed made prior to
 said statute of 1806, and by existing laws when made, was
 evidence of an advancement, should have that effect, though
 that act repealed all prior acts falling within its purview, and
 though the grantor died after that act passed.

10 Ves. 477,
 Leake v.
 Leake.

§ 7. In general a provision by will is considered as an ad-
 vancement in the party's life time to satisfy a portion under a
 settlement, but the will may direct otherwise, or to satisfy
pro tanto.

ART. 3. *Who is next of kin on these statutes?*

§ 1. As these statutes are worded exactly like the English
 statute of *distribution*, all using the words, "*next of kin*,"
 constructions made upon that statute will hold good here; and
 as also, they are constructed in this respect by the rules of the
 civil law. And on this English statute it has been decided,
 that the grandmother is next of kin in preference to the aunt,
 and so takes before her: that the next of kin who takes by
 the statute must be ascertained by the rules of the civil law,
 including the relations both on the paternal and maternal sides.
 All in the fourth degree, for instance, take equally.

Salk. 261,
 Davis' case.
 —2 Bl. Com.
 78, Chris.
 Notes.

2 Com. D.
 476.

§ 2. But brothers and sisters exclude grandparents; yet
 all by those rules are in the second degree, for grandparent
 and grandchild is two degrees. And from brother to
 brother, is two degrees, to wit: from the intestate or deceased
 brother to his parent is one, and from the parent to the parent's
 child, that is, the surviving brother, is another degree. There
 is no representation, or distribution *per stirpes*, but among
 immediate descendants, and the children of brothers and sis-
 ters; the grandchildren of brothers and sisters are excluded.

Raym. 596.—
 Prec. Ch. 28.
 1 Mod. 409.

12 Mod. 619.

§ 3. A niece is not entitled to distribution with a grand-
 mother, the grandmother is two degrees, the niece three de-
 grees removed from the intestate.

2 Com. D.
 474, Chan.
 3 D. 1.

§ 4. Aunts and nephews are in equal degrees of relation
 and shall take *per capita*, and not *per stirpes*, and so is our

statute of March 12, 1806; and so was the prior rule of practice.

§ 5. A brother or sister of the half-blood has an equal share with those of the whole blood in the same degree. 1 P. W. 53, 595; 1 Mod. 209; 2 Mod. 204; and *Sawyer v. Tenny*, an American case above stated.

§ 6. If three persons who are dead leave issue, one leaves two children, another three, and another five children, all take in equal degree and *per capita*. The same if the brothers were of the half blood. But if one brother had survived the intestate, then the children of the others must have taken *per stirpes*, that is, the children of each brother must have taken their father's part only; and this rule of law is incorporated into our statute of March 12, 1806. The father is next of kin to a son or daughter, and so is the mother, the father being dead. The "granddaughter of a sister, and the daughter of an aunt of the intestate are in equal degree, and the distribution shall be equal,—each is in the fourth degree. In New York by statute law, children of said three brothers deceased take *per stirpes*.

§ 7. The brother's grandchild does not share with the brother's child, nor aunt's child with the uncle, they are in different degrees. If no widow, father, mother, brother, sister, or issue, or issue of either, the estate goes equally to grandfather and grandmother: if none such, then equally to great grandfathers and great grandmothers, uncles, aunts, nephews, and nieces, they all being of kin in equal degree, to wit, the third: and if none such, then to the kindred in the fourth degree.

§ 8. An infant in *ventre sa mere* at its brother's death, shares the estate with the mother, as if born before his death. 5 D. & E. 49; 2 H. Bl. 399.

§ 9. Brothers of the half-blood will inherit an estate tail. In the civil computation the intestate himself is the *terminus a quo* the several degrees are computed; in the *canon* or common law, the common ancestor. If no infant in *ventre sa mere* devisee, next devisee takes.

§ 10. Next of kin in granting administration (after husband and wife,) are: 1. Children whole and half-blood: 2. Parents of the intestate: 3. Brothers and sisters: 4. Grandfathers: 5. Uncles or nephews.

§ 11. It is said the issue of an elder nephew is next of kin, and by right of representation will inherit, but the younger nephew is next of blood, and will take a remainder limited to next of blood. This distinction does not appear to hold on statutes of distribution.

Cn. 126.
Art 3.

Durant v. Prestwood, 1 Com. D. 343.

1 Com. D. 343. *Jason v. Bury*, Wall v. Needham, *Dawes v. Dawes*.—1 East, 120, 131.—*Ratcliffe's case*, 3 Co. 40.—2 P. W. 383.—6 Johns. R. 322.—Salk. 250.

2 Vern. 168.—2 Bl. Com. 505.—1 P. W. 45, 63.

Barnard. 272.

2 Bl. Com. 504, 505.—7 D. & E. 100.—1 Bos. & P. 243.—4 Bos. & P. 390.—2 Stra. 1092.—4 Ves. jr. 322. 2 Bl. Com. 504, 505.

Co. Lit. 10.—*Watkins*, 152, 153.—Hob. 33.

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Trowbridge,
Amer. Pre.
292, cites 1
Atkyns, 254.

See Pr. Ch.
54.—2 P.
W. 344.—
3 P. W. 40.—
1 Atk. 455.

§ 12. It is stated, if the mother be alive, though there be no brothers or sisters, but only nephews and nieces, they share equally with the mother, in exclusion of the grandfather or grandmother; stated as being on our 9th Anne. By that act the representatives of brothers and sisters are made heirs with the mother. But in the first section of our act of March 12, 1806, it is provided, "if the intestate shall leave no issue, father, brother, or sister, then the same shall descend to his mother, if any." Hence, she takes all to the exclusion of nephews and nieces of the intestate where he leaves no brother or sister, going upon the ground that the nephews and nieces of the intestate cannot inherit it by representation with his mother, but where he leaves one brother or one sister or more. Was this thought to be the construction of the 9 Anne?

1 Atk. 455.

§ 13. The chancellor said that the statute of distribution supposes that there must be "some persons to take in their own right, and some by right of representation; so that if there be no brother or sister alive, the nephews and nieces cannot take by representation." And shall they take *per capita* with the mother? Though there be seven of one brother, and seven of another, shall each take a share with her? On the whole, must not the fair construction of the 9 Anne, be the same as the said rule expressed in the act of March 12, 1806? The late Chief Justice Parsons who drew that act was probably of that opinion, as was the legislature that passed it, as there is no reason to suppose there was an intention to alter the law in this respect.

12 Mod. 623

§ 14. Our statutes, above stated, have restored some parts of the ancient law of England, that existed before the conquest and long after, by which all the children inherited both real and personal estates. But in the time of Henry I. the daughters were excluded where there were sons; but males still inherited alike, especially in *socage* tenures. And even then if one died without issue, his lands went to his father or mother, and not to collaterals. But soon after the law, as to lands, was further altered, and the father and mother were excluded, and it was held that lands should not ascend to father or mother, but rather go to collaterals. This alteration did not extend to personal estates, which still went and go to father and mother in preference to brothers and sisters of the intestate, and all other relations except his descendants. By the same rule personal estate goes to grandfather or grandmother in preference to uncles and aunts; for the grandfather is nearer a kin than the uncle, for the uncle and nephew are not otherwise a kin, but as they derive their relation from the grandfather, so not in equal degree. And this on the whole is according to the Hebrew law.

§ 15. Though an infant now, unborn at his father's death, is considered as absolutely born, and though then in *ventre sa mere*, he takes as then actually born, yet this was not the law formerly; but such infant was not entitled to the mesne profits from his father's death to the time of his entry; but on our statute he must have them from the time of his birth, for then the estate must open and let him in, in common with the other heirs. And on the English statute of distribution a *posthumous* is as much entitled to a distributary share as one born before the father's death.

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Art. 3.

Watkins, 142,
146.—2 P. W.
446.—2 Atk.
117.

§ 16. And when waste is committed on the estate of inheritance of a child in *ventre sa mere*, chancery will grant an injunction against the waste, on a bill filed in favour of such child by its next friend, and such infant may be appointed executor, though it cannot act till seventeen years old. Land was devised by A to B, on condition he pay £1000 to each of his children at his death. Held, a child born after was entitled to £1000. And if the child unborn may be heir when born, the inheritance, in the interim, goes to the presumptive heir. So one unborn may be devisee, in *ventre sa mere* or not. And it is now not material whether the words of the devise are in the present or future tense; for though the words of the devise be in the present tense, it must clearly be the testator's meaning the devisee take when born and not before.

2 Vern. 710.
—Reeves' D.
R. 295, 296.
—1 P. W. 286.
—5 D. & E.
60.—Hob. 3.
—1 W. Bl.
613.—
4 Burr. 2167.

§ 17. *Words of condition, &c.* Devise to infant in *ventre sa mere*, &c. A devised leasehold messuages to his wife for life, and remainder to such child as she was supposed to be pregnant with, in fee, but if such child die before twenty-one, and having no issue, remainder over to his wife and two sisters, one third each, in fee: his wife was not with child. Held, a devise to an infant in *ventre sa mere*, is good: 2. These words may be taken as words of limitation, and as no such child existed, the remainders over immediately took effect; and not too remote. See *Westcombe v. Jones*.

2 Stra 1092,
1093, *Andrews v. Fulham*; cited 6
Cruise, 545,
508.—1 Ves.
421.—1 Wills.
107.—3 Burr.
1624.

§ 18. *Half-blood no obstruction &c.* In 1797 Elisha Marsh died seized in fee of land, leaving an only child, and widow, its mother. This child died, under age, A. D. 1813, and never having been married. Held, on its death, the land descended in equal shares to the surviving mother, and to her children by a former husband, brothers and sisters of the half blood to said child. The mother claimed the whole as next of kin and sole heir of said child. Statute of 1733, c. 36, as to this subject, construed the same as 4 W. & M. c. 2; and 9 Anne, c. 2. Same decision as to the half-blood, *Tenny v. Sawyer*. In this case it was held: 1. That the statute of distribution of 22 & 23 Car. II. c. 10, has always been adopted here: 2. That A. D. 1690, it was finally settled, "that

12 Mass. R.
490, *Sheffield v. Lovering*.

СН. 126. brothers and sisters of the half-blood were entitled by" this statute "to share equally with those of the whole blood :?" 3. Art. 3. That our said Provincial act of 1692, (4 W. & M. c. 2,) adopted, substantially, the provisions of the said English statute of distributions; and so received the same construction as to the half blood, &c. : 4. That Mary Marsh being the only child and heir of her father, took all his estate, and not a portion of it, and the estate became hers and she the stock, and hence when she died under age, the clause in the act of 1692, and after acts that related to a portion or share, did not apply to her case, as she left not a portion or share in her parent's estate : 5. After 1692, if any child died a minor, and unmarried, its portion only in its parent's estate was equally divided among his surviving children : 6. But if one such child acquired any estate of its own from any other source, and died intestate, over or under age, such estate descended "according to the general provisions of the act" of 1692, "namely, to the next of kin to the child ;" that is, first, its father, second, the mother, third, brothers and sisters &c. : 7. Had the act of 1692 continued the force, the mother of Mary Marsh would have taken the whole of her estate ; as it was not a portion of her father's estate, but the whole, it has become her estate, and she the *propositus*, she had at her death no surviving children to take from her : but 8. The said 9th of Anne was passed, which limited the mother to a share &c. in the deceased child's estate, with its brothers and sisters &c. ; this act made no distinction as to estate, or over or under age, but left the clause in the act of 1792, as to portion, in force, of a child dying a minor : 9. Said act of March 1784, was construed a revision of the said former acts ; and hence if a child died a minor, and unmarried, leaving estate not derived from its father, it was equally divided between its mother, and surviving brothers and sisters ; but if a child died of age, by said act of 1784, its estate was divided between its mother, and brothers and sisters, and not representatives of any. See a. 2, s. 2. The act of March 1806, restored this expression, *representatives*, &c. ; not noticed in this case, the act of 1784 omitted this expression, except the clause is correctly cited.

CHAPTER CXXVII.

ESTATES, BY DEVISE.

ART. 1. General principles.

Executory devises have been already examined in the class of executory interests; as also what estates may be devised.

§ 1. It appears that lands in England, before the conquest, ^{2 Bl. Com. 373.} were devisable by will, and the restraint upon passing estates in this manner, took place as a part of the feudal system, a leading principle in which was, to restrain every feudatory from passing his estate in lands to any new owner without the consent of the superior, who always made it a point to have such tenants as he preferred to perform the feudal services appertaining to the land. It is not strictly true that lands were not devisable by the common law; they were so before the conquest, though not so for centuries after it. Some lands in England however were always devisable by particular customs, now of little or no importance to us.

§ 2. A devise is an instrument that has its inception in the life time of the testator, and is a disposition by him then when the will was made, but it does not take effect till his death, to which, when proved, it relates, and titles under it to both real and personal estates relate to that period. It is the last part of a will that governs. It prevents the descent of the land to the heir. The devisee may enter after the devisor's death, and he has the freehold and interest in him in law, before he enters, nor does he want the executor's assent, as a devisee of chattels real, or personal estate does. ^{3 Wood's Con. 591.—Co. Lit. 169.—Co. Lit. 111.}

§ 3. In this case which was fully and largely argued it was settled, that land purchased by the testator after he makes his will, cannot be devised; for the statute 32 H. VIII. c. 1, enacts, that one having manors, lands &c. may devise. And the 34 & 35 H. VIII. c. 5, enacts, that any person "having a sole estate or interest in fee simple, of and in any manors, lands, tenements, rents, or other hereditaments, in possession, reversion, or remainder, or of rents or services incident to any reversion or remainder, shall have power to give, dispose, will, or devise, to any person or persons, (except bodies politic and corporate,) by his last will and testament in writing, or otherwise by act or acts lawfully executed in his life by himself solely, or by himself or other jointly, severally, or particularly, or by all those ways, or any of them, as much as in ^{11 Mod. 148 to 163, Archer v. Bokenham.—2 Bl. Com. 375.—1 Saund. 277, n. 4.—32 H. VIII. c. 1.—34 H. VIII. c. 5.}

CH. 127. him of right is or shall be, all his said manors, lands, ~~tenements~~, rents, and hereditaments, or any of them, or any rents, commons, or other profits, or commodities, out of or to be perceived of the same, or out of any parcel thereof, at his will and pleasure. The court said, in this case of *Archer v. Bokenham*, that it is a principle to construe a statute according to the rules of the common law in cases of a like nature ; “ for statutes are not presumed to make any alterations in the common law, further or otherwise than the act does expressly declare.” And what might have been expressed in the act, and is not, shall not be presumed or intended. The common law never allows a person to convey or dispose of lands he has not, or had no right or interest in at the time of making and executing such conveyance,—as Co. Lit. 265 : nor is the principle at all affected by the operation of a feoffment, with livery of seizin on the land ; or a release with warranty that rebuts, or a release of a possibility to the tenant in possession ; and though the testator being *inops consilii* is a reason for not construing a devise so strictly as a conveyance at common law, yet all is on the “ supposition that the testator has wherewithal to make disposition of.” “ Wills have been all along construed according to the intent, and so has the law all along supported those conveyances to uses, on the supposed intention of the party, though there should be some defect in them. The law has done the same as to wills. They are likewise supported according to the intention of the party to supply such little defects as may be in them.” But surely no man can convey a use he has not at the time of the conveyance, as 3 Cro. 401 ; for one cannot raise a use out of land not his own. And so a will cannot be a conveyance or a disposition of what the testator has not. The testator must have a legal capacity and sufficient discretion, at the time of making his will, and so he must have an interest in the thing, or he has no disposing power over it ; and his property can no more come to him after he has made his will than his capacity can. So the estate of the testator must remain the same from the making of the will to his death ; therefore if he be seized in fee, and make his will, and then makes a feoffment “ to the use of himself and his heirs, though this is a small alteration in the estate, yet it revokes his will.” And so have been many decisions, “ that a man cannot dispose of lands before he has them :” and if the testator devise the lands he shall have *in futuro*, it makes no difference. 9 Johns. R. 312.

2 Bl. Com.
378.

§ 4. A devise will operate only on such lands as the deviser had at the time of making his will ; a will of lands being rather in the nature of a conveyance declaring the uses.

As to personal estate, the will will operate on whatever he has at the time of his death. A devise is "expounded rather on its own particular circumstances than any general rules of positive law." The personal estate is not exempted from paying debts by doubtful words in the will, so as thereby to throw the charge of them on the real estate. 14 Mass. R. 83. For by law the personal estate is the proper fund for the payment of debts and legacies, and must be so applied, unless exempted by express words or necessary implications. *Seaver v. Lewis.*

CH. 127.
Art. 1.

2 Bl. Com.
382.

§ 5. So a devise of all the lands I shall have at my death, does not pass lands I purchase *after* the devise is made. But a devise of things personal is good, though the testator has them not when he makes his will; but said a chattel real, as a lease for year, after purchased or taken, does not pass. And as to lands the constant form of pleading is, the testator being seized, devised, and there is no difference between a devise of lands in *socage* and *gavelkind*, by custom; but had there been a republication of the will of these after-purchased lands, they would have passed by it, "for the republication is as making a new will. On this principle, if a minor, or feme covert, make a will, and republish it after of age, or discover, the will passes the lands &c. And if one devise land to two and their heirs, and one dies in the testator's life time, the other takes all; and if one devise his manor, and a tenancy afterwards *escheat*, it will pass by the devise, as being part of the manor.

Salk. 237,
Bunter v.
Coke.

§ 6. A devise is made to him who bears the testator's name; he who bears his name at his death takes the estate. *Watkins, 136.*

§ 7. If a testator devise an estate to A and his heirs, but if he die without settling or disposing of the same, or without issue, then over to another, A may settle the estate in his life time, and thereby complete his title and defeat the limitation over. *4 D. & E. 441, Beachcroft v. Broome.*

§ 8. If A have an estate of his own in B, and another in C, and having the legal but not beneficial interest in an estate in D, with power to appoint it to either of his sons, by will devised "all his estates of what nature or kind soever in the county of B, and all in the county of C, or elsewhere in the kingdom of England, after paying of his debts &c." to a younger son; held, that the trust estate he had the power of appointing did not pass by this general devise. For Lord Kenyon said, it appeared from the whole will, though the testator used general words in the residuary clause, "that he only meant to give that in which he had a beneficial interest, and which he had a power of charging with the payment of his debts. But it was clear he could not subject this trust

8 D. & E.
118, *Roe v. Reade*, cited
6 Cru. 233.—
Lade v. Holford, 3 Burr.
1416.—1 Ch.
R. 101.—
5 Vesey jr.
339.—2 Eq.
Ca. Abr. 606.

CH. 127. estate to the payment of his debts. 6 Cruise, 229 to 235;
 Art. 1. Cro. Car. 37, 447.

1 Saund. 35,
 Cook v. Ger-
 rard.—The
 rest in a will
 passes a re-
 version.—

1 Saund 180.
 —1 Lev. 212,
 cited 6
 Cruise, 221,
 Wheeler v.
 Waldron.—
 2 Vern. 461.
 —3 Wood's
 Con. 592.

§ 9. A devise of the free use for a year passes the interest for that time. A testator was seized of *demesne* lands and reversion lands on the life of R. in B, and devised the *demesne* lands to his wife for a year, and then devised all his lands in B to Thomas, to hold immediately after one year from the death of the devisor and the death of the said R. Held, the *habendum* shall be construed distributively, and Thomas shall take the *demesne* lands at the expiration of one year, and the reversion lands after the death of the said R. In this a construction was given against the plain sense of the words, in order to effectuate the intentions of the testator and to give a reasonable operation to his will. 2 Vent. 285; Ch. 135, a. 2, s. 11.

§ 10. A devisee is an assignee, and is capable of exercising any power granted to the assignee,—so to maintain an action of covenant &c.

1 D. & E.
 201, Worsley
 v. Craven.
 —3 Com. D.
 359.—1 Ves.
 187.—7 D. &
 482.—Sbo.
 649.—Dougl.
 716, n. 717, n.
 —2 M. & S. 5,
 Doe v. Davie.
 Dyer, 53 b.—
 4 D. & E.
 601.—3 Com.
 D. 359.—2
 Mod. 313.—
 6 Cruise, 8.
 Must be sepa-
 rately attest-
 ed, 54.—Ch.
 R. 195.

§ 11. *Codicil*. A will and codicil are to be read as being made at the same time and incorporated. It is an addition to, or an explanation of a will, a part of it, and may be made before or after the will; and there may be several to one will. It no further revokes a will than as it is in opposition to some particular dispositions of it; but a second will revokes the first. A codicil republishes the will and makes it of the same date with the codicil.

2 Mod. 313,
 314, Steed v.
 Perryer.—
 6 Cruise, 88,
 130, 159.

§ 12. After the 32 & 34 H. VIII. it was sufficient that a will was put in writing by the testator, or by another with his direction, without any other execution; but otherwise since the 29 Ch. II. c. 3, to which our statutes conform. By all which the will must be in writing, signed by the testator, or by his direction, and subscribed in his presence by three or more credible witnesses. But a will need not be written in any set form of words.

§ 13. *Republication makes a new will*. But it must be in writing. As where Robert Perryer being seized of the land in question, and having two sons, William and Robert, devised to Robert and his heirs; he died, living the testator, leaving a son Robert who had a legacy in the will. The testator afterwards annexed a codicil, agreed to be a republication, and published the will *de novo*, and declared the son, Robert, should have the land as his father would had he lived. Judgment for the son in the C. B., but against him in the K. B., and for the testator's heir at law; for, as argued, the devise to Robert become void by his death, and no codicil or republication could make that good which was before void. And the republication of the devise to the testator's grandson was by words, and not in writing, so void by the statutes.

§ 14. If the testator refer expressly to a written paper and sufficiently describe it, this paper is incorporated into his will, and makes a part of the will, whether executed or not. And a paper written in the form of an indenture has been holden to be a will; and so though there be an actual delivery of the instrument, as of a deed, it may be a will, where it appears a will was intended, and revocable accordingly. A man may make several devises or wills "of different interests in one and the same estate." So a deed may be annexed to a will to explain it where provided for in it, and serve the purposes of a codicil.

CH. 127.
Art. 2.

2 Vesey jr.,
228, Haber-
gham v. Vin-
cent.—Pow.
on Con. 39.
—Pow. on
D. 13, 14, 18,
23—6 Cru.
70, 71.—5 D.
& E. 92.

§ 15. The testator, May 2, 1752, made a will and signed it, but no seal or witnesses thereto. January 5, 1754, he added a codicil on the same sheet of paper, which respected only personal estate, and in that said his will of 1752 was to be in nothing annulled (except as to a legacy therein,) this codicil he signed in the presence of three witnesses, and then held the sheet in his hand and declared it to be his will, and they attested it. Held, the whole is one entire disposition, and good, and the latter part is not in fact a codicil, and a will may be made at different times.

1 Burr. 548,
Carlton v.
Griffith.—6
Cruise, 56.

ART. 2. *Massachusetts statutes.*

§ 1. As early as 1639, a law was passed by the colony legislature, directing, "that there be kept records of all wills, administrations, and inventories." And 1649 an act was passed directing wills to be proved at the next county court being above thirty days after the testator's death; and if the executor knowingly neglected to do this, he forfeited £5 a month, and heavy penalties were inflicted upon all who meddled with the estate of the deceased before it was legally proceeded with.

C. & P. Laws,
43, 203 to
207. Act 16,
39, &c.—Wills
how made,
proved, &c.
in the Colo-
ny.

§ 2. By an act passed 1652, two magistrates with the county clerk, were authorized to prove wills attested, or proved on oath of two or more witnesses: also, to grant administrations "to the next of kin," or to such others as should be able to secure the estate &c.

Act 1652.

§ 3. By an act passed May 1685, the magistrates of each county court had power, "as the ordinary in England, to summons any executor" &c. accepting the trust, to make and exhibit on oath "a just and true inventory of all the known lands, tenements, goods, and chattels of the deceased," on penalty not exceeding £10 a month for neglect of duty: and also to call the executor to an account once a year, and might receive any complaint against him from any legatee, to summons him to appear, to fine him for non-appearance, to hear the complaint and to decree thereon, and grant execution; "likewise to hear and determine all cases relating to wills and

Act 1685.

CH. 127. administrations, and to make their decrees, and to grant executions thereupon, allowing to the party aggrieved liberty of appeal to the magistrates of the next Court of Assistants, ^{sec.} party attending to the law as in other cases respecting appeals."

Act 1685.

§ 4. By another act passed the same year, (October) the county court had power to require the executor to give bonds with sufficient sureties, "for paying all debts and legacies, and to make and exhibit a just and true inventory of all the known lands and tenements, goods and chattels of the deceased," and to fine him for negligence, not exceeding £10 a month, and to call him to account on the complaint of any creditor or legatee, and to try cases of legacies and issue executions therein, and to hear &c., as in the act of May 1685, adding, "that when matter of fact is controverted, then either *pl't.* or *deft.* may have a trial thereof by jury, if it be desired, with liberty of appeal to the next Court of Assistants as the law directs." In February 1685 an explanatory act was passed, empowering the county court to do as above with the executor, without complaint, and directing more particularly the manner of proceeding against him, and repealed the act passed in October 1685, (year then ended March 25th).

C. & P. Laws,
pp. 234, 235.
A. D. 1692,
3 sect.
Wills how
made and
revoked &c.
in the Prov-
ince.

§ 5. In 1692 a law of the Province was passed, directing, that after December 31, 1692, "all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses," or else be utterly void. The act then provided, that such devise be not "revocable, otherwise than by some other will or codicil in writing, or other writing declaring the same, or by burning, cancelling, tearing, or obliterating the same by the testator himself, or in his presence, or by his direction and consent. But all devises and bequests of lands and tenements shall remain and continue in full force, until the same be burnt, cancelled, torn, or obliterated by the testator, or his direction, in manner aforesaid; or unless the same be altered by some other will or codicil in writing, or other writing of the devisor, signed in the presence of three or four witnesses declaring the same, any former law or usage to the contrary notwithstanding."

Nuncupative
wills.

§ 6. Section 7 provided, that a *nuncupative* will should not be valid for above £30, not proved by the oaths of three witnesses present at making it, nor unless proved the testator at the time of making it, "did bid the persons present, or some of them, bear witness that such was his will or to that effect, nor unless such *nuncupative* will were made in the time of the

last sickness of the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more, next before the making of such will, except where such person was surprised or taken sick, being from his own home, and died before he returned to the place of his or her dwelling."

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§ 7. Section 8 enacted, "that after six months passed after the speaking of the said pretended testamentary words, no testimony shall be received to prove any will *nuncupative*, except the said testimony or the substance thereof were committed to writing within six days after the making of the said will."

§ 8. Section 9 enacted, "that no letters testamentary, or probate of any *nuncupative* will shall pass the seal of any court, till fourteen days, at the least, after the decease of the testator be fully expired; nor shall any *nuncupative* will be at any time received to be proved, unless process be first issued to call in the widow or next of kindred to the deceased, to the end, they may contest the same if they please." (Such will not made at the deceased's habitation, nor where he resided for ten days next preceding, but legally authenticated, must be established, though very unwell when he left home, if afterwards he was taken more dangerously ill, and died where his will was made: 2. If in reducing such testamentary words to writing in time an independent part be omitted, the residue may be good. 4 Hen. & Mun. 91, 100, Marks & ux. v. Bryant & ux. The word *surprise* in the 29 Ch. II. also, but not in the Virginia statute of 1785.)

§ 9. Section 10 enacted, "that no will in writing concerning any goods, chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words or by word of mouth only, except the same be in the life time of the testator committed to writing, and read to the testator and allowed by him, and proved to be so done by three witnesses at least." "Provided always, that notwithstanding this act, any soldier being in actual military service, or any mariner or seaman being at sea, may dispose of his moveables, wages, and personal estate, as he or they might have done before the making of this act."

Wills, how altered &c. in the province.

Mariners &c.

§ 10. Section 1. In 1700 it was enacted, "that as often as any child shall happen to be born after the death of the father, without having any provision made in his will, every such *posthumous* child shall have right and interest in the estate of his or her father, in like manner as if he had died intestate, and the same shall accordingly be assigned and set out, as the law directs for the distribution of estates of intestates."

C. & P. Laws, 351, 352. A. D. 1700. See ante. Posthumous.

CH. 127. § 11. Section 2 enacted, "that any child or children, not
Art. 2. having a legacy given them in the will of their father or mother, every such child shall have a portion of the estates of their parents given and set out unto them, as the law directs for the distribution of the estates of intestates; provided such child or children have not had an equal proportion of his estate bestowed on them by the father in his life time." A. D. 1718, these provisions were extended to grandchildren.

No legacy to a child &c.

This act also provided, "that if a man made his will and then married, and died, his widow should have such part of his estate assigned to her as if he had died intestate."

C. & P. Laws,
877, 378. A.
D. 1703.
Inventories,
bonds, &c.

§ 12. A. D. 1703, an act was passed requiring executors to exhibit an inventory in three months &c. on oath "of the whole estate of the deceased, so far as is then come to his hands and knowledge" &c., or give bond to pay debts and legacies on penalty of £5 a month; but no such bond to be accepted where the estate was generally bequeathed. Also an executor being residuary legatee could by this act sue his co-executor. Writs not to run against the bodies of executors or administrators but on *devastavit*.

C. & P. Laws,
426. A. D.
1719.—
Estate not
devised &c.

§ 13. In 1719 it was enacted, section 3, that all "estate whether real or personal, that is not plainly given away and disposed of, in and by the last will and testament of any person thereafter to be proved, the same accordingly shall be distributed in the same manner as if it were an intestate estate, and the executor or executors shall administer on the same as such."

2 Mass. L.
1031. A. D.
1752.—
Act of Par-
liament as to
attesting
wills.

§ 14. Act of parliament passed 1751, as to the attestation of wills, extended to the Colonies. By this act it was enacted, sect. 1, "that any person attest the execution of any will or codicil, which shall be made after June 24, 1752, to whom any beneficial devise, legacy, estate, interest, gift, or appointment of, or affecting, any real or personal estate, other than except charges on land, tenements, or hereditaments, for payment of any debt or debts, shall be thereby given or made; such devise, legacy, estate, interest, gift, or appointment, shall, so far only as concerns such person attesting the execution of such will or codicil, or any person claiming under him, be utterly null and void. And such person shall be admitted as a witness to the execution of such will or codicil within the intent of said act, (29 Ch. II.) notwithstanding such devise, legacy, estate, interest, gift, or appointment mentioned in such will or codicil.

Legatees, &c.
how wit-
nesses &c.

Creditors
witnesses.

§ 15. Section 2 enacts, "that in case by any will or codicil already made, or hereafter to be made, any land, tenements, or hereditaments are, or shall be charged with any debt or debts, and any creditor whose debt is so charged, hath attest-

ed or shall attest the execution of such will or codicil, every such creditor, notwithstanding such charge, shall be admitted as a witness to the execution of such will or codicil, within the intent of the said act." CH. 127.
Art. 2.

§ 16. Section 3 enacts, "that if any person hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil, which shall be made (before June 24, 1752) to whom any legacy or bequest is or shall be thereby given, whether charged upon lands, tenements, or hereditaments, or not; and such person before he shall give such testimony concerning the execution of such will or codicil shall have been paid, or have accepted or released, or shall have refused to accept such legacy or bequest upon tender made thereof; such person shall be admitted as a witness to the execution of such will or codicil within the intent of the said act, notwithstanding such legacy or bequest." Provided, "in case of such tender and refusal, as aforesaid, such person shall in no wise be entitled to such legacy or bequest, but shall forever after be barred therefrom, and in case of such acceptance as aforesaid, such person shall retain to his own use the legacy or bequest, which shall have been so paid, satisfied, or accepted, notwithstanding such will or codicil shall afterwards be adjudged or determined to be void for want of due execution, or for any other cause or defect whatsoever."

Legatees
how made
witnesses.

§ 17. Section 4 enacts, "that in case any such legatee as aforesaid, who hath attested the execution of any will or codicil already made, or shall attest the execution of any will or codicil which shall be made," (before June 24, 1752) shall have died in the life time of the testator, or before he shall have received or refused the legacy or bequest so given to him as aforesaid, and before he shall have refused to receive such legacy or bequest on tender made thereof, such legatee shall be deemed a legal witness to the execution of such will or codicil, within the intent of the said act, notwithstanding such legacy or bequest; provided always, that the credit of every such witness so attesting the execution of any will or codicil in any of the cases in this act before mentioned, and all circumstances relating thereto, shall be subject to the consideration and determination of the court and jury before whom any such witness shall be examined, or his testimony or attestation made use of;" so in the court of equity &c., and to all intents as the credit of other witnesses may be considered.

Legatee dying,
how a
witness.

But their
credibility
considered.

§ 18. Section 5 enacts, "that no person to whom any beneficial estate, interest, gift, or appointment shall be given or made, which is hereby enacted to be null and void as aforesaid, or who shall have refused to receive any such

A legatee a
witness can
have no ben-
efit or loss.

CH. 127.
Art. 2.



legacy or bequest on tender made as aforesaid, and who shall have been examined as a witness concerning the execution of such will or codicil, shall, after he shall have been so examined, demand or take possession of, or receive any profit or benefit of or from any such estate, interest, gift, or appointment, so given or made to him in or by any such will or codicil, or demand, receive, or accept from any person or persons whatsoever any such legacy or bequest, or any satisfaction or compensation for the same, in any manner, or under any colour or pretence whatsoever."

Mass. Act,
Feb. 6, 1784,
who may
devise &c.—
[Maine Act,
ch. 38.]

§ 19. Section 1 enacts, "that every person lawfully seized of any lands, tenements, or hereditaments within this State, in his or her own right, in fee simple, or for the life or lives of any other person or persons, of the age of twenty one years and upwards, and of sane mind, shall have power to give, dispose of, and devise the same, as well by last will and testament in writing, as otherwise by any act executed in his life time, to and among his children or others, as he or she shall think fit."

Devises, how
made and
and witness-
ed in the
Common-
wealth.

§ 20. Section 2 enacts, "that all devises and bequests of any lands or tenements shall be in writing, and signed by the party so devising the same, or by some person in his presence, and by his express direction, and shall be attested and subscribed in the presence of the said devisor, by three or more credible witnesses, or else shall be utterly void and of no effect. And moreover no devise in writing, &c.—so adopts the residue of the first clause in said act of 1692.

Nuncupative
wills.

§ 21. Sections 3, 4, 5, as to *nuncupative* wills, are the same as sections 7, 8 & 9, aforesaid, in said act of 1692, except instead of £30, as in that act, the sum is £50 in this act of 1784.

§ 22. Section 6, in this act of 1784, is the same as section 10 in said act of 1692.

Section 7 in this act of 1784, as to *posthumous* children, is the same as the act aforesaid of 1700, section 1.

§ 23. Section 8 of this act of 1784, as to children not provided, is the same in substance as the second section of the said act of 1700, above cited, and as amended A. D. 1718.

A relation
dying &c ,
his lineal
descendants
take his part.

§ 24. This 8th section adds, "and when any child, grand-child, or other relation have a devise of personal estate, or real estate, and such devisee shall die before the testator, leaving lineal descendants, such descendants shall take the estate real or personal, in the same way and manner such devisee would have done in case he had survived the testator:"

Widow's
election &c.

Also, that the widow in all cases may waive the provision made for her in the will of her deceased husband, and claim her dower and have it assigned in the same manner as though

her husband had died intestate, in which case she shall receive no benefit from such provision, unless it appears by the will plainly the testator's intention to be in addition to her dower." And as it sometimes happens, that a will respecting land and personal estate, through inattention or otherwise, may be attested and subscribed by a less number of credible witnesses than this act directs for devising lands, tenements, and hereditaments, which, if approved and allowed as a testament of personal estate only, might defeat the original intention of the devisor respecting the settlement of his estate :

CH. 127.

Art. 2.

Wills as to real and personal estate, how viewed.

§ 25. Section 9. Be it therefore further enacted &c., "that any will in writing hereafter offered for probate, which purports a disposition of both real and personal estate, that shall not be attested and subscribed as this act directs for the devising of lands, tenements, and hereditaments, shall not be approved and allowed as a testament of personal estate only."

Void as to the real, how so as to the personal.

These added clauses in this 8th section are new provisions.

§ 26. Section 10 in this act, as to estate not devised in the will, is stated Ch. 126, a. 2, under the head of Estate by Descent.

§ 27. Sections 11, 12, 13, 14, & 15, in this act of 1784, are the same as those above stated in the act of 1752, sections 1, 2, 3, 4, & 5. The residue of this act of 1784, respects executors as noticed in Ch. 29. The last and 20th section of this act repeals all former laws relating to devises of lands, tenements, hereditaments, and chattels.

§ 28. Devises of lands by Indians within the State, are void if not approved by the General Court.

Mass. Laws, 1030.

§ 29. By the third section, in the act of March 8, 1792, it is enacted, "that whenever any person shall hereafter, in and by his last will and testament, devise any lands, tenements, or hereditaments, to any person for and during the term of such person's natural life, and after his death, to his children or heirs, or right heirs in fee, such devise shall be taken and construed to vest an estate for life only in such devisee, and a remainder in fee simple, in such children, heirs, or right heirs, any law, usage, or custom, to the contrary notwithstanding."

Mass. L. 543.
—Mass. Act, March 8, 1792.

What a life estate &c., in certain devises.

§ 30. Generally the matters and expressions in these statutes are plain and clear. However there are some things which from the nature and extent of the subject, or matters included in some expressions, must lead to some uncertainty, and make a recourse to decisions on these necessary. As,

First. When is one lawfully seized of lands &c., so as to devise ?

Second. When is the testator of sane mind, so as to devise ?

Third. What is signing by the testator ?

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Art. 3.



Fourth. What is subscribing by the witnesses in his presence ?

Fifth. Who is a credible witness to a will or devise ?

Sixth. When is a will legally published ?

Seventh. How may a will be revoked ?

Eighth. How and when must a child be noticed &c. in a will, to be excluded a distributive portion ?

Ninth. When is estate devised or not,—or is *intestate, residuum, lapsed devise, &c.*

Tenth. The effect of the recited clause, in the act of March 8, 1792.

Eleventh. What is a good republication of a will ?

All these matters will be briefly examined and considered in the following articles, and on each head rules laid down, and cases cited to illustrate them. The authorities on these eleven points, in substance, will be found to apply to all the States in the Union except Louisiana.

ART. 3. *Material points in these statutes considered; and when is one lawfully seized of land &c., so as to devise it ?*

§ 1. In addition to what is said on this point, Ch. 125, a. 6, and 1 art. this chapter, and in several other chapters, it may be observed, that every one is lawfully seized of lands in possession, remainder, or reversion, in coparcenary, and in common, and in proprietary lands, so as to devise, where he has title, and there is no adverse seizin or possession; but he must be so seized, as well when he makes his will as at his death; and when he has title, and there is no adverse seizin, his power to devise extends also to rents, common, or to any other profit out of land, and even to contingent interests in certain cases.

W. Bl 33, 34,
Moor v. Hawkins—Pow.
on D. 34, 35.

§ 2. As in this case G devised all his estates, in trust for his son J, and if he died without issue, under age, then all his estates should go to C, his heirs and assigns. Held, C might well devise this contingent interest in J's life time, though C died before J, he afterwards dying under age and without issue.

1 Ves. 223,
422.

§ 3. But the grantor of an estate, subject to a condition of re-entry, cannot devise it, though he has an estate in the condition, yet has not the land until the condition is broken; nor can his devisee take advantage of the breach merely as such; the benefit of it must go in privity to the grantor's heir at law, who alone must enter for breach of condition. This last reason seems strongly to distinguish this case from that of *Moor v. Hawkins*. A gets B's deed of land by fraud, B may devise it. 15 Mass. R. 113.

§ 4. It is said in some books, that if the disseizee devise the land, and then enter and die seized, the devise will pass

the land, because by the re-entry the disseizin is purged, and his entry relates to his former seizin. CH. 127.

Art. 4.

§ 5. It will be observed, that these cases were on the English statutes of 32 and 34 H. VIII., above stated, and which we adopted and followed till February 6, 1784: till that time we had no statute, as will be observed, but this, expressing what estate a man might devise; the first of these speaks of a man's having lands, &c.; the second, of his having lands, or seized of lands, &c. he might devise, also in reversion &c., in common &c. Our act of February 6, 1784, it will be observed, speaks of the devisor's being lawfully seized of lands. Why was the word, *lawfully*, and *de novo*, added? If we attend accurately to words, there must be a material difference between being *seized* and being *lawfully seized*. Yet it is believed the legislature did not, when it passed this act, mean to alter the law, and it is well understood that there never has been any alteration in practice, and it is also believed that not an instance is to be found in any adjudged case in which this difference of expression has ever been noticed. On the whole, our law on this point must be understood to be, that if one seized of lands in any way, as expressed in the 34 and 35 H. VIII., he may devise his interest therein here as in England; and therefore all the English authorities on this point apply in this State. The lawful seizin mentioned in the act of 1784 seems to have been viewed as any such seizin in fact, by right or by wrong, as has enabled the person seized to convey the land by deed; and a seizin that enables one to pass land by deed, may enable him to pass it by devise.

ART. 4. *The same points continued; and second, when is the testator of sane mind so as to devise.*

§ 1. According to this act, sect. 1, of February 1784, any person of twenty-one years of age and of sane mind may devise. As to age it has been already shewn, that if one be born January 1, he is of age any time of the day December 31; and this twenty-one years &c. applies only to lands, tenements, and hereditaments, and not to personal estate or chattels; and by this act one may make a will of these alone, and then the age of twenty-one does not apply. We must look then for some other law on this point, either actually in force or grown into usage, and that is the Colony act of 1641, which enacted, that "the age for passing away lands, or such kind of hereditaments, or for giving votes, verdicts, or sentences, in any civil courts or causes, shall be one and twenty years; but in choosing guardians, fourteen years. And all persons of the age of twenty-one years, as aforesaid, and of understanding and memory, whether excommunicate,

Mass. L. 961.

CH. 127. condemned, or other, shall have full power and liberty to make their wills and testaments, and other lawful alienations of their lands and estates;" thus the age of twenty-one was early fixed for making wills of personal estate &c., and the spiritual law rejected.

Art. 4.

1 Mass. R. 335.—4 Mass. R. 593.

3 Mass. R. 330, Pool v. Richardson.

4 Mass. R. 593, Buckminster v. Perry.

Richardson on Wills, 41.—5 Bac. Abr. 502.

6 Co. 23, Winchester's case.

2 Bl. Com. 497.—Richd. 32.

Pow. on C. 30, Ormond's case.—3 P. W. 129.—5 Bac. Abr. 502.

Rich. on W. 43.—5 Bac. Abr. 503.

Rich. on W. 48, 49.

§ 2. The question then is, who of twenty-one years of age is of *sane mind*, able in law to make his or her will. In the nature of things this question is subject to some uncertainty; there can be no settled rule of judging. It is a question of fact to be left to the jury, on our law, to decide according to the evidence; however, adjudged cases may be some guide.

§ 3. Our settled practice is, for him who offers the will for probate to open and close.

§ 4. It has been also settled, that "the subscribing witnesses to a will may testify their opinions of the *sanity* of the testator; other witnesses may testify facts, from which the court or jury may form an opinion whether the testator was *competent* or not."

§ 5. In this case two or three witnesses thought the testator was *much broken* and *very forgetful* when he made his will, "and they testified particularly to several slight cases of want of recollection;" but all the subscribing witnesses being clear he was of sound mind when he executed his will, it was proved and allowed.

One of a mean capacity may make a will, "though he rather incline to the weaker sort;" but not if so weak as to believe an ass can fly.

One expression used in this case of Winchester is, *sane and perfect memory*, so as to dispose with reason and understanding.

§ 6. By the Roman and English law, males of fourteen and females of twelve years of age may make their wills of their personal estates to any amount, at which ages their minds are usually feeble.

§ 7. "Nor is a person being of a weak understanding, of itself any objection in law, to his binding himself by his assent or contract; for neither courts of law or courts of equity examine into the wisdom or prudence of men in their manner of their transacting their concerns, or disposing of their estates." It is enough to be legally *compos mentis*, "be he wise or be he unwise."

§ 8. So one *partially intoxicated*, so as to have his understanding obscured, and his memory troubled, yet may he make a will.

§ 9. So one at the point of death may make a will, if he can speak, though so as to be understood but badly; and if it do not appear plainly whether he is or is not of perfect mind,

or memory, he is presumed to be of sound mind, and may make a will,—and though reminded by another to do it, if honestly done. CH. 127.
Art. 5.

§ 10. But an aged man *very childish* cannot make a will; so if one be so forgetful as not to remember his own name, he cannot make a will; nor if one be *entirely drunk*. Rich. on W.
43.—5 Bac.
Abr. 502.

§ 11. The Roman and English definition of a *non compos* is, "*Furiosus autem stipulare non potest, nec aliquid negotium agere, quia non intelligit quod agit*;"—"non multum distant a brutis qui ratione carent." And Coke says, a *non compos* is one "who has no discretion, nor the use of reason." And "every person is presumed to be of sound mind and memory, unless the contrary be proved." Hence witnesses who say the testator is mad or *non compos*, must give good reasons for their opinions. Such and other cases, and not general expressions, shew what is legal sanity. And the same portion of mind that prevents one's being an idiot, prevents one's being a *non compos*. Bracton Lib.
3, fo. 100.—4
Co. 126, &c.
Beverly's
case.
Rich. on W.
40.

§ 12. From these and other cases it results: 1. That a weak mind may be legally sane, as a common peasant of a weak mind may be *compos*: 2. Though one has lost much of his mind, he may be *compos*; as if one's mind be very eminent at forty-five, and much enfeebled at seventy-five, yet he is *compos* if not *very childish*: 3. One of sound mind is presumed, in law, to remain so, till the contrary is clearly proved: 4. The law, on the question if one be *compos* or not, makes no distinction between important and common affairs, large or small property, nor can it without leading to endless distinctions and litigations. Hence a minor is, in law, as incapable of giving a penal bond of \$1 as of \$1000, or of making a conveyance of one acre of land as of 50,000 acres.

§ 13. In this action the court held, that the attesting witnesses are by law placed about the testator to examine and judge of his sanity and capacity, and must all be produced if they can be. 3 Mass. R.
237, Chase v.
Lincoln.

Case of Mrs. Norris' will, see post, art. 6. A lunatic restored to his reason may make a will, though the guardianship remains. 12 Mass. R.
489.

ART. 5. *Same points continued: Third. What is signing by the testator.*

§ 1. The statutes on this point require signing. According to the authorities it is not very material on what part of the paper the testator signs his name, though undoubtedly best at the close.

§ 2. Signing at the top, as *I John Stanly* make this my last will and testament &c., is a sufficient signing. This was de- Pow. on D.
61, 67, 76,
Lemayne v.
Stanley, A. D. 1681.—3 Com. D. 360.—6 Cruise, 50; cited 1 Ph. Ev. 436.

CH. 127.
Art. 5.



cided on a special verdict in ejectment. The will was in the testator's own hand-writing, beginning thus, "In the name of God, I John Stanley make &c.," and devised the lands in question. He had not subscribed his name, but only put his seal. This instrument was subscribed by three witnesses in his presence; and held to be a good will, *quoad the lands*, after many arguments; but that this may be a signing, there must not appear the testator meant to sign otherwise and could not. Statute does not say where it shall be signed.

2 Bl. Com.
501, 502.

§ 3. "A testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at the publication, is good." Here was properly no signing. The 32 H. VIII., did not require signing, but it is by the statute of frauds, and by our statute. See Ch. 90, a. 12.

3 P. W. 252,
3 Com. D.
360, Stone-
house v. Eve-
lyn.—3 Lev.
87.—Comyn's
R. 197, 200.

§ 4. If the testator owns his signing to the witnesses, it is sufficient, of course such acknowledgment to any one of them is sufficient. And 2 Ves. 454, *Grayson v. Atkinson*. And if he write his name at the top or side of the paper, it is sufficient. 1 Ves. jun. 12, *Ellis v. Smith*; and *Lemayne v. Stanley* is recognized; 1 Wils. 313; but each sheet must be signed &c., or all fastened together. 6 Cruise, 51, 52, *Right v. Price*; 1 Ves. & Beames, 362; 8 Ves. jun. 504.

Pow. on D.
60, 68, 69.—
1 Phil. Ev.
437.—1 Ves.
jr. 14.—2 Atk.
66, *Wallis v.*
Hodgson.

§ 5. *What is a subscribing by the witnesses in the testator's presence.* When they subscribe, they need not be together, nor see the testator sign. It is enough if he own his signature to them, (and *Stonehouse v. Evelyn*, above,) who are called to attest: 1. His capacity to make a will: 2. The capacity to sign; and the heir has a right to the proof of sanity from each and all of them, when the will is proved, whom the statute has placed about his ancestor.

Dougl. 241,
Right v. Price.
—6 Cruise,
51, *Cater v.*
Price.

§ 6. Subscribing as witnesses in the testator's presence is now considered as subscribing within his view; and it is not sufficient he be corporeally present, but he must have a knowledge of the fact, and not be in a state of insensibility; and the nature of the case implies that the witnesses attest the will at the request of the testator, though this is not actually required by the statute. And when his will is attested, he must be in a capacity to dispose of his property.

3 Com. D.
362.—*Carth.*
80, 81.—
Willes, 1.

§ 7. If a will be subscribed by three witnesses together in a room, where the testator cannot see them, it is void; but good if they subscribe within his view, though in another room.

Brue v.
Smith, 6
Cruise, 54.

§ 8. The attestation need not state the witnesses subscribed their names in the testator's presence. Making their marks is signing. See *Marks*, Index; and 4 Taun. 217. So attestation by it is good. 1 Phil. Evid. 437.

§ 9. In this case Sir George Sheers, being sick in bed, made his will, and signed it in the presence of three witnesses, but he being ill they withdrew into a gallery, between which and the chamber where he lay, there was a lobby with glass doors, and the glass broken in some places. In this room the witnesses subscribed the will. "It was proved the testator might have seen from his bed where he lay the table in the gallery on which the witnesses subscribed, through the lobby and broken glass windows; and this was adjudged a good will to pass lands, for the statute required attesting in his presence, to prevent obtruding another will in the place of the true one; it was therefore enough if the testator *might* see; it was not necessary that he *should* actually see the signing." This case has been often cited, and held for law.

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Art. 6.

Salk. 688,
Shires v.
Glascock.—
Pow. on D.
90, 91.—6
Cruise, 60.—
Salk. 688.—1
Ld. Raym.
507.

§ 10. This was a case decided on the same principle: the testator was in one room, and the witnesses attested his will in another, but so that he could see them; and the attestation was deemed good and sufficient, though no evidence he did see them subscribe. So if he may open his bed curtains and see them, it is sufficient.

Salk, 395.

§ 11. So where a woman went, with her will, to an attorney's office to execute it, but she executed it in her carriage, and the witnesses attended her; she remained in it, and they returned into the office, and there subscribed it, the carriage being put back to the window of the office, through which she *could* see what passed in the office. Held, this will was well executed. There are many cases to the same effect in the books, all resting on the same ground; that is, that the testator may see the witnesses subscribe, if he chooses, with altering his situation. As Longford v. Eyre; Broderick v. Broderick, 1 P. W. 239; Machel v. Temple, 2 Show. 288; also 1 Maule & Sel. 294.

Pow. on D.
92.
Brown's Ch.
R. 99, Cas-
son v. Dade;
cited 6Cruise,
62.

§ 12. And if in his presence or not, is a question for the jury to decide upon the evidence; and if there be no proof of the fact one way or the other, the court will intend the attestation was regular and according to law.

6 Cruise, 60,
61.
Comyns, 531,
Hands v.
James, 6
Cruise, 62.

§ 13. A will attested by two witnesses will not pass lands, though confirmed by a codicil, attested by two, one of whom did not attest the will. May attest at different times. Cook v. Parsons.

ART. 6. *The same points continued: Fifth. Who is a credible witness to a will or devise.*

§ 1. This case contains all the most important law on this head. This was decided on a special verdict, finding that the testator had charged the residue of his real and personal estate with payments of his debts and legacies, and that A, B, and C, were witnesses to the will; and that at the time they

1 Burr. 414 to
443, Wind-
ham v. Chet-
wynd, A. D.
1757.

CH. 127. attested it, and that at the time of his death, they were credit-
 Art. 6. ors to the testator in account, but were paid off before they
 were examined to prove the will. After two arguments, the
 court decided, that they were good and credible witnesses,
 and that the will was well proved; the objection was, that
 they were not credible witnesses at the time of the attestation,
 hence this was not a good will of lands within the statute of
 frauds. 29 Ch. II.

§ 2. But Lord Mansfield and the court decided, as above,
 and said, the said statute is silent as to the capacities of wit-
 nesses; "*credible*" presupposes the evidence given, and so is
 never used as synonymous to "*competent*;" after the *compe-*
tence of a witnesses is allowed, the consideration of the cred-
 ibility arises, and not before. This word, *credible*, in a stat-
 ute, can mean no more than that the credibility of the witness
 is to be weighed; but this credibility is no part of the neces-
 sary form in the attestation of wills, and said that the word *credi-*
ble, in the statute, was probably used as a *word of course*, and
 misapplied; that, at the time this act was passed, there was
 no law whereon a question could arise as to the competency
 of a witness, at the time of his knowing the fact he came to
 testify, but only where he was competent or credible at the
 time of the examination. Whether a witness to a will was
 competent or credible, at the time of examination, cannot
 be the question; for he may die or become interested before
 that time; what objections then to a witness are good or not
 must be left to the judges on the circumstances of the case:
 1. On the ground of the case: 2. On the authorities. First,
 on the ground of the case, the power of devising ought to be
 favoured; it is the natural consequence of property, was a
 right before the conquest, and it ceased in the time of H. II.,
 on the introduction of the feudal system, soon revived in the
 form of declarations to uses. The statute of uses accidentally
 checked this, and then the statute of wills was made. The
 29 of Ch. II. did not mean to restrain devises of lands; they
 had become more reasonable than before the conquest or
 among the Greeks and Romans; the statute was intended on-
 ly to guard against fraud; but perhaps it has overturned more
 fair wills than it has prevented fraudulent ones. "Suppose
 the subscribing witnesses honest, how little do they know;
 they do not know the contents; they need not be together;
 they need not see the testator sign, (if he acknowledge his
 hand it is sufficient;) they need not know it is a will, (if he
 deliver it as a deed it is sufficient.)" Judges then must lean
 against objections to the formality.

§ 3. *Rules laid down.* He is a witness if at the time of
 his examination his testimony does not tend to support his ti-

tle, and to enable him to hold or recover an interest under it. So if he have as great or greater interest that the will be set aside ;—a release, payment, or a tender, makes him a witness. So if his interest at testator's death cannot take effect. And the same as to a legacy or devise. Remote interest that may disqualify in other cases, does not in case of a will ; as a devise to the poor of the parish does not disqualify the parishioners from being witnesses ; this they cannot release.

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§ 4. The objections of *interest* proceed on the idea of a too great bias of the mind of the witness, but may be taken off by shewing the witness has as great or greater interest the other way, or that he has given it up.

§ 5. "The presumption of bias arises as at the time of the subscription." But it may be answered by shewing the witness was heir at law, or that the devise is void, or that he has renounced it : and 2. "In many cases a presumption of a bias from a legacy, at the time of the subscribing, has been allowed to be taken off by a release.

§ 6. A witness to a will not interested at the execution or at the testator's death, is competent, though interested at his examination. A legatee is one against a will. Salk. 691, Oxenden *v.* Penerice.

2 Ves. jr. 636,
Brograve *v.*
Winder.—
Esp. D. 716.

§ 7. T. J. seized of hereditaments in fee, devised to W. H. and his heirs. W. H. was one of the three witnesses to the will. And it was held, he was not a credible witness, and therefore that the will was not well attested ; he continued to be interested as devisee.

Com. R. 91,
Hilier *v.* Jen-
yngs.—Pow.
on D. 114.—
1 Phil. Ev.
433, 303.—4
Dessauss. Eq.
R. 274.—2
Bay, 448.
2 Stra. 1253,
Holdfast *v.*
Dowsing.

§ 8. In the above case of Hilier *v.* Jenyngs, it was settled, that persons any way interested, as well as persons rendered incompetent by crimes, were not within the description of credible witnesses ; thence another question arose, if non-credibility could be purged by any matter *ex post facto*. And in this case Holdfast *v.* Dowsing stated Ch. 89, a. 4, in which the wife of the witness had an annuity that continued and could not be released, it was held, the witness could not be made competent or credible. These cases were before the said statute of 1752.

§ 9. In this case John Knott devised estates to trustees in trust for poor people of various descriptions in the Lordship of Maulsmeaburn, witnesses Henry Holme, Robert Burra, and John Mitchell. Holme and Burra were two of the trustees and owned lands in said Lordship, and possessed them, and were assessed and assessable, to support the poor there, &c. Before the trial Holme and Burra released all their interest under this will to the other trustees, and they and Mitchell conveyed away their estates and interests in said Lordship and Township before the trial, respectively. Held, by three

Pow. on D.
130, Doe *v.*
Kersey.

CH. 127. judges they were credible witnesses, Pratt C. J., *contra*;
Art. 6. for their releases and dispositions of their respective estates
 and interests, as above, restored their credit; as a witness
 “incompetent at the time of attestation might purge himself
 afterwards, either by release or payment, and become competent by the rule of law.”

Mrs. Norris’
 will. See below.

§ 10. In the case of Mrs. Norris’ will, in our Supreme Judicial Court at Salem, November 1811, there was no doubt but that witnesses to the will, as John and Daniel Jenks, who had beneficial interests bequeathed to them in it, might by their releases make themselves credible witnesses, and it was done accordingly, and other legatees in the will were paid and made witnesses to support the will on releasing &c.

§ 11. It appears the judges in England have been much divided upon the point in *Doe v. Kersey*, or rather upon the general principle on which that case turned.

Sarah Chadwick’s will.

§ 12. In the case of Sarah Chadwick’s will in the county of Essex, the Rev. Mr. Eaton of Boxford was a subscribing witness, and had a legacy in it of \$200; he released it, and was admitted a credible witness to prove the will,—and it is believed we have invariably practised on this principle. See 15, below.

8 Mass. R.
 371, Hathorn
 & al., appellants,
v. King,
 exr.

§ 13. This was an appeal from a probate decree, and the question was, if Mary Norris was of sane mind when she made her will. And two important points were decided: 1. That “the physicians may be inquired of, whether from the circumstances of the patient, and the symptoms they observed, they are capable of forming an opinion of the soundness of her mind, and if so, whether they from thence conclude that her mind was sound or unsound; and in either case they must state the circumstances or symptoms from which they draw their conclusions.”

§ 14. Second. That if the jury “shall be of opinion that the testatrix at the time of dictating her will had sufficient discretion for that purpose, and that at the time of executing her will she was able to recollect the particulars which she had so dictated,” they might find their verdict that she was of sound disposing mind and memory at the time of executing her will:—and they found their verdict accordingly.

2 Johns. Cas.
 314, Jackson
v. Durland.

§ 15. A husband was a witness to a will containing a devise to his wife. Held, such devise is void, and he a competent witness. Same principle, 4 Johns. R. 311, *Jackson v. Denniston*; statute in New York, Sess. 36, c. 23, s. 12, is like 25 Geo. II. A. D. 1752. See Ch. 90, a. 12, s. 22; 1 Johns. Cas. 163; 2 Johns. Cas. 314; 1 Root, 462, 491. A judge of probate is a competent witness to a will. And 1 Day, 35, *Cornwell v. Isham*.

ART. 7. *The same points continued : Sixth. When is a will legally published.* CH. 127. Art. 7.

§ 1. It is clear the law requires no set form of publication, and so are the authorities.

As in this case it was held, that it is not necessary "the testator should declare the instrument he executed to be his will. This was decided by Lord Mansfield, and all the judges; this was the case of Sir Thomas Chitty's will; but the witnesses must see the whole. Bolensbroke's will :—This will was written before the statute of frauds, but his codicil after; both written by himself. The will had his seal and name subscribed, and he noticed interlineations. Near below a codicil was written A. D. 1679, by himself; this too had his seal and name subscribed; at the top of the will was written, "*signed, sealed, and published as my last will and testament in the presence of*—the same being written here for want of room below." The names of the three witnesses were below this, subscribed, so not below the codicil; two of them were dead; the third said, that twenty-seven or twenty-eight years before, that he and the other two were in the night called into the testator's chamber, and he produced a paper folded up, and desired them to set their names to it as witnesses, and that they did so in his presence. But they did not see any of the writing, "nor did the earl tell them it was his will, or say what it was," nor did he sign or seal it in their presence. The jury found it to be a good will, and a good codicil. This case is cited as good law in Powell on Devises, 79 to 81; Roberts on Frauds, 309, 311, 393; and 5 Bac. Abr. 510. As to the word *published* being written in a will, it can no more prove the publication, than the word *delivered*, written in a deed, can prove the delivery of the deed. In this case : 1. The witnesses could not read the will : 2. Did not see it signed : 3. They did not know it was a will.

1 W. Bl 407,
422.—3 Burr.
1773, Bond v.
Seawell. A.
D. 1765.—6
Cruise, 68.—
Peate v.
Ougly,
Comyns' R.
197;
6 Cruise, 68.
—Ch. 93, a.
3, s. 8.—
1 Phil. Evid.
437, 438.

§ 2. So in this case it was held, that no form of publication is necessary. As where the witnesses were deceived by the testator, and led to think the instrument was a deed by the words he used; for it was delivered as a deed, and the words *sealed and delivered* were written &c. Held, to be a good will; for it might be inconvenient to families to have "it known that a person had made his will. Cited as law, Roberts on Frauds, 309, 311, 314. If a witness to a will become insane, his handwriting may be proved as if dead.

Pow. on D.
82, Trimmer
v. Jackson.—
6 Cruise, 68.

§ 3. So a publication of a will may be inferred from circumstances. Thomas Wallis wrote his will himself, of real and personal estate &c., and concluded, *signed, sealed, published, and declared* &c. The papers were open, and the testator asked the witnesses to take notice, and signed in their

6 Cruise, 68,
Bennett v.
Taylor.

Pow. on D.
83, 86, Wallis
v. Wallis.
A. D. 1760,
Roberts on
Frauds, 309,
311.

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presence ; they attested the part that lay open by his direction where to sign : no otherwise did the testator declare it his will or say that it was his will, or say what it was. All this one witness stated ; the other two could not recollect if they signed one or two papers, or that they knew it was his will &c., both testified that they did not see him sign or seal ; that the other was not then in the room ; that he did not declare it his will &c. : but by other witnesses it was proved that the two said, at the time, they had been witnessing the will. It was, 1. Objected that before the statute of frauds the publication of a will was essential, that there was nothing in that to take it away. But it was denied on the other side, that before or since that act, publication was necessary ; and if necessary, here was a publication, as asking them to take notice, then shewing them where to sign ; the words, *sealed, published, &c.* being open to view, and their then saying they had witnessed the will. The jury found it to be a good will.

5 Bac. Abr.
514, 518.

§ 4. Sealing, signing, or saying the writing is his will, is a good publication ; for any of these acts shew or declare his intent it shall be his will. A will written by the testator himself proves itself, though no signing, witnesses, or publication. Reasons,—the law requires only the substance, nor does it require any particular publication : only 1. That the will be in writing : 2. Signed by the testator : 3. Attested by three witnesses : and 4. In his presence : 5. That he knows it is his will : and 6. That he intends it to be his will completed.

Pow. on D.
81, Ross v.
Ewer.

§ 5. This case, and perhaps the only one, seems to be the other way. In this Lord Hardwicke on the question of publication said, no doubt but the testator executed the instrument in the presence of three witnesses, or of their attesting it in his presence, but this was not enough. Roberts, 395, notices this case and says, Hardwicke's opinion was gratuitous and extrajudicial. "Whereas the cases of *Peate v. Ogley*, *Trimmer v. Jackson*, *Stonehouse v. Evelyn*, and others, which have been decided for the contrary doctrine are decisive and direct authority." Further reasons for the above construction of the expression, publication of wills. The law construes signing liberally ; hence it has been held, in sundry cases, that if the testator acknowledge his signature, proves his signing : but doubtful if he only acknowledge the paper is his will.

Pow. on D.
78, 79.

§ 6. So the expression, *in the testator's presence*, has been liberally construed to mean *within his view* in all cases, or in any place where he might see the witnesses subscribe his will.

§ 7. It is enough the testator treats the papers as his will ; as it is enough one treats a deed as his deed.

§ 8. To require the testator, as in *Swett v. Boardman*, Ch. 93, a. 3, above, to make known to the witnesses when

they attest, that he intends it as his will, is not according to the authorities, nor is it reasonable, because this fact of making it so known will depend on no writing, but the recollection of witnesses. This may often be forgotten by them, as wills are often made a long time before they are proved; and also, if the witnesses be dead, this kind of publication cannot be proved. And there is no statute that requires publication in this manner.

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§ 9. Powell observes, that before the statute of frauds, publication or declaring a will was perhaps necessary to prevent mere loose minutes unfinished being proved as a will; and adds, this is done away by the acts providing for signing and the finishing act of attestation.

Pow. on D.
12, 13. &c.

§ 10. Practice is not always the rule. Judges ask the witnesses if they saw the testator seal; yet the statute requires no seal, and our Supreme Judicial Court has declared a seal is not necessary. Of the like mere formality is the question to them, if they heard the testator declare it to be his will. This is an ancient practice, continued without attending to the principle; the statute has provided another security against fraud and imposition, to wit: acts that shew a finished will is made. And it may be of evil consequence to require other publication: 1. It often produces great evils in families to have it known a will is made: 2. Declaring it to be a will is mere words, not written, and may honestly be forgotten, and if made essential, the will is lost: but 3. If the witnesses choose designedly to forget these words, and say they do not recollect them, the will is lost without remedy: 4. Witnesses may die, and then what proof can there be of such declaration? If they deny their signatures, they may be proved. In Swett's case, there was no evidence the testator knew he signed a will.

4 Mass. R.
460, Avery v.
Pixley.

Pow. on D.
82.

ART. 8. *The same points continued: Seventh. How may a will be revoked or cancelled.*

§ 1. Our statutes of 1692 and of February 6, 1784, point out particularly how wills may be expressly revoked, that is, by burning, cancelling, tearing, or obliterating the same by the testator or by his direction, or by some other will or codicil in writing, or other writing of the deviser, signed in the presence of three or four witnesses declaring the same. This provision respects real estates only: and though the principle is plain, many questions have arisen in point of fact, as to what is cancelling &c. A will purporting to be solely of personal estate may be revoked, as in ancient times, in many ways. And it is held, that "there are *virtual* as well as express revocations, since making the statute of *frauds*, as well as before &c. Dougl. 31.

Ch. 93, a. 2,
s. 8; a. 3, s.
5, 28.—Ch.
101, a. 5, s.
33.

2 Atk. 272.

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5 D. & E.
124, *Shove v.*
Pincke.—
6 Cruise,
106.

§ 2. Among the multitude of cases on this head, a small part only can be selected here.

§ 3. In this case the plt's claimed legacies under the will of Ann Hornyer, against her heir at law, who claimed under certain deeds of hers. The court held, that though those deeds were not sufficient to convey the estate, yet in law they operated to revoke her will, as it appeared she intended the deeds should revoke it. A revoking will when itself revoked restores the first. *Lofft*, 558, 609 ; 4 *Burr.* 2515.

3 Wills.
142, *Gulliver v. Poynts*.
As to the description of the thing devised, see also *Cro. Car.* 293.—
1 H. Bl. 26—
Ambi 356.—
6 D. & E.—
345.—2 Bos. & P. 303.—
1 Wash. 300.

§ 4. In all matters relating to wills the court will mainly regard the testator's intentions. Hence in this case the court said, "cases in the books on wills may serve to guide us with respect to general rules in the construction of devises in wills, but unless a case cited be in every respect directly in point, and agree in every circumstance with that in question, it will have little or no weight with the court, who always look upon the intention of the testator as the polar star, directing them in the construction of wills." And in this case, to find what the testator meant by *messuages*, the court took into view the time and manner of his purchasing and holding the estate. 2 *John. R.* 622 ; 1 Bos. & P. 53 ; *Cro. Car.* 57, 129, 447 ; 8 *East*, 149 ; 9 *East*, 366 ; *Dyer*, 261.

3 Wills. 497.
Goodright v. Harwood,
A. D. 1774.—
2 W. Bl. 937.—
Lofft, 282,
558.—*Cowp.* 37.

§ 5. If the jury in a special verdict, find that the testator by a subsequent will made a different disposition of his estate, though they find not in what particulars, nor is the last will to be found, yet it is a revocation of the former will ; for though the jurors say it is unknown to them in what particulars the dispositions differed, yet it is intended in the disposition of the estate in question. By three Judges. *Blackstone J.* was of a different opinion. Many cases cited. *Blackstone* relied on the case of *Sir Henry Killigrew*, 3 *Mod.* 203 ; *Salk.* 592 ; *Hard.* 374,—where it was held, that the subsequent will, which did not appear, was not a revocation of the former : from which he inferred, "that a second will, unless the contents thereof be found, is not sufficient to revoke a former will ; for it may, or may not be consistent with the former." This judgment was reversed in *K. B.* and parliament.

Bro. P. Ca.
489.—
6 Cruise,
83.—*Cowp.*
87.

§ 6. In this action it was agreed that implied revocations of wills subsist since, as before the statute of frauds. *Lord Mansfield* said, "a subsequent marriage and birth of a child, affords a mere presumption ;" "there is no case in which marriage and the birth of a child, have been held to raise an implied revocation, when there has not been a disposition of the whole estate ;" "but this presumption (of revocation) like all others, may be rebutted by every sort of evidence." As *parol* and other evidence ; *Spragge v. Stone*, Ch. 101, a. 5, s. 32, 33, 34.

4 *Burr.*
2182.—
Dougl. 31.
Brady v. Cabbitt. 1 *Saund.*
277.—6 Cruise,
102, 104, 106,
120.—*Dougl.*
35.—*Ambi.*
721.

§ 7. Held, that if A mortgage his estate and then devise it, and afterwards pay off the mortgage, and the mortgagee convey the legal estate to a trustee, in trust for the mortgagor, this change of the legal estate shall not operate as a revocation of the will. Lord Mansfield said, it was true, "that a mere trust estate shall not be set up against a *cestui que trust*; but this rule is only in ejectment in a clear case." "In such a case where the trust is perfectly clear and manifest, the rule stands upon strong and beneficial principles, because in ejectment the question is, who is entitled to the possession. But if the trust be doubtful, a court of law will not decide upon it in an ejectment; it must be put into another way of inquiry." In this case the mortgagor when he devised had a mere equitable fee in him, Mrs. Child was his trustee then on paying the mortgage. She conveyed the legal estate in fee to Pickering, which was merely transferring it from one trustee for the mortgagor, to another: this could not revoke the will. A revoking will must be attested as the will revoked is.

§ 8. If H make his will, and devise his land to one in fee, and after mortgages his land to another in fee, this is no total revocation, but the equity of redemption shall pass to the devisee: but such mortgage &c. may sever a joint tenancy.

§ 9. So if A mortgage his land and afterwards devises it, this is no revocation. An after will is not always a revocation. 6 Cruise, 81.

§ 10. Marriage alone is a revocation of a will of lands by a woman. And if a will be in two parts, and the testator destroyed that in his own possession, this is a revocation. If the will, be of all the testator's lands, marriage and the birth of a child is a revocation. If a will be revoked by a subsequent will, but not cancelled, it is re-established by cancelling the subsequent will: not if the contents of the after one be unknown.

§ 11. In this case the court decided, that if a *feme sole* devise lands to A, and then marries him, this is a revocation of her will. (*Secus* if she survive: 6 Cruise, 105.) As she has no power to revoke it herself, the law revokes it for her. A devises his equitable estate and then buys the legal, this is no revocation of his will. Loft, 609; 6 Cruise, 105.

§ 12. In this case a special verdict found a will of land, and that afterwards the testator made another. This does not import a revocation, for the after will may be of lands purchased after the first will was made, or of other lands, or in confirmation of the first will, or consistent with it.

§ 13. A being single made his will and gave all his estate to J. S., and afterwards he married and had several children, and died without other will or disposition. Held, that this

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Dougl. 710,
Doe v. Potts,
6 Cruise, 123.
—Dougl. 718,
Watts v. Ful-
larton.—1
D & E. 435,
and note.
6 Cruise, 122.

14 Mass. R.
208.

Salk. 158,
York v.
Stone—2
Cruise, 525.—
3 Salk. 315.—
3 Wils. 511.—

Dougl. 35, in
Brady v.
Cubitt.

6 Cruise, 81,
82.

4 Co. 61,
Forse v.
Hembling.—
2 D. & E.
684.—5 Co.
10.

2 Salk. 592,
Hitchins v.
Basset.—6
Cruise, 82.

2 Salk. 592,
Lugg v. Lugg.
—1 L. Raym
441.

CH. 127. change of circumstances affords presumptive evidence of a revocation. 12 Mod. 236, is the same case. Adds that a presumptive revocation may be rebutted by any evidence.

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Richardson
on Wills, 292
to 295.

Cowp. 90.—
3 Atk. 798.—

§ 14. *Revocation as to part.* The testator devises lands to A, and afterwards, in his life time, settles part of the lands on A. This is no revocation as to the residue. And a lease or mortgage is a revocation but only *pro tanto*. So partition is no revocation. If the first will give A a fee simple, and the second gives him a fee tail in the same land, it is a revocation for the difference between the fee and the fee tail.

3 Burr. 1490,
Swift v. Roberts.—6
Cruise, 27.—
3 Ves. jr. 650.
—5 Ves. jr. 664.

§ 15. January 20, 1750, Richard Gilbert devised his right, part, and title, and interest, held jointly with his sister. October 10, 1754, they made partition, he died first. Held, that partition between tenants in common does not revoke a will, but a joint tenant cannot devise his part, and though he afterwards make partition the will is void; but otherwise if a republication be made after partition. Richard had not a devisable interest when he made his will, and such will is void both at common law and by statute. A will cannot sever; at common law it is a revocable appointment, or limitation of the land, *causa mortis*, and not like the Roman testament as the constitution of the heir.

Cowp. 49 to
64, Burton-
shaw v. Gil-
bert, cited 6
Cruise, 92,
100, 142.—
3 Call, 334,
Yerby v.
Yerby.—4
Ves. jr. 848.—
2 Johns. R.
31, Jackson
v. Kniffen.—
6 Cruise, 97.

§ 16. In 1759, Nicholas Newenden made his will and a duplicate of it; delivered the duplicate to A. In 1761 he made a second will, and thereby revoked the first, and then cancelled that part of the first in his own custody; before he died he sent for an attorney to write a third will, but was senseless before he arrived. After his death the first and second wills were found together in a paper both cancelled; but the duplicate of the first was found uncanceled among his other deeds and papers, but no evidence how it came there from A's hands; held, the act of cancelling the second will did not set up the duplicate of the first: for it appeared on the whole his intent was in cancelling his will of 1761 not to revive that of 1759, but in order to make a third will different from both the others. And it is the testator's intentions that govern in all such cases.

Cowp. 812,
Sutton v. Sut-
ton.—Mole
v. Thomas, 1
W. Bl. 1043.

In this case the testator made his will duly attested, and disposed of his estate, part to trustees to certain purposes, and afterwards with his own hand made many alterations in this will; these not attested; altered some legacies, and gave some new ones; and the court held, he had not thereby revoked his will, at least as to the estates in trust. *Wilcox v. Rootes*, 1 Wash.

1 Wils. 309,
Parsons v.
Freeman &
al.—
6 Cruise, 107,
112, 118.

§ 17. Mrs. Freeman being entitled to an estate in tail in the lands in question, after the death of Mrs. Sawyer, and to

a fee in other lands, by articles in 1739, in consideration of a settlement to be made upon her by Mr. Freeman, covenanted that the lands in question should be conveyed to him in fee, and the other estate to him for life. Mr. Freeman being thus entitled to an equitable estate under the articles, afterwards and before the same were carried into effect by legal conveyance, made his will and devised the lands in question to some of the depts. After thus making his will, he having the equitable and his wife the legal estate, joined in a deed to make a tenant to the *præcipe* to levy a fine and suffer a recovery, which were both done, and declared the same should enure to such uses as they two should by deed jointly direct, limit, and appoint, and in default thereof to the use of Mr. Freeman in fee. She lived some time after; he survived, and no joint deed of appointment was ever made by them. Held, this fine and recovery, and deed to lead the uses, was a revocation of Mr. Freeman's will. And Chancellor Hardwicke said revocations of wills had ever been favorable to the heir, that it was admitted, if the testator had a legal fee and devised it, and then suffered a recovery, it would revoke his will, or if to such uses as he should direct, and on default thereof to him in fee. So it is clear if one seized in fee devises, and then conveys the same by any legal conveyance and takes back a new estate, this revokes his will. So "if one seized in fee devises, and after levies a fine to his own use in fee," this is a revocation, though the testator is in of the old use; but if seized in fee, and leases for years, or mortgages, or conveys to pay debts, these are only revocations *pro tanto*. So if one "seized of an equitable estate devises it, and afterwards a new conveyance is made by his consent and some new trust declared for him, this would be a revocation;" but otherwise whenever the devisee has a redemption. Freeman's will could only convey his equitable estate to the devisee, and then by the fine, &c. he gained a legal fee in the whole; "this was more than gaining to himself a legal estate in the lands, wherein before he had only an equitable one; "for he has, besides declaring the same to other uses, gained to himself a legal fee in that wherein he had before only an equitable estate for life." But if one have "an equitable estate which he devises, and after by legal conveyance takes the legal estate therein," this is no revocation, for in such case the conveyance only changes an equitable into a legal estate; and if Mr. Freeman "had only taken a fee in the lands in question and nothing more, it would have been no revocation." Those in question were those in which he originally had an equitable fee. These various rules, laid down by Lord Hardwicke, are established by many authorities. The general prin-

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See many cases of devises of equitable estates only contracted for by the devisor, Sugden's Vendors &c., 130 &c. as More, 123, 262, 265.—10 Mod. 518.—1 Ves. 458.—3 Johns. Ch. R. 310, 316.—2 Ves. jr. 679 —10 Ves. jr. 597.—15 Ves. jr. 391.—7 East, 8.

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ciple to be extracted from the whole seems to be this, that if the testator leaves at his death a different estate in quantity from that he devised, and this difference is produced by some intermediate deed or conveyance of his, it amounts to a revocation of his will *quoad hoc*; but if the same estate in quantity, though varied by such conveyance in its nature, it is no revocation, unless he takes a new estate, or new trust by such deed or conveyance. Testator devises all to an only daughter, then has several children,—is a revocation. 5 Burr. 2806.

1 Saund. 277,
Wms. notes,
cites 4 Burr.
1960, Roe v.
Griffiths.—1
Rol. Abr 616.
—11 Mod.
158.

§ 18. And “whenever the deviser puts the whole interest of the lands devised out of himself, by any conveyance whatsoever, after making his will, it is a revocation of it, although he takes the same estate back again.” As if A seized in fee makes his will, and afterwards executes a feoffment in fee to the use of himself and his heirs, and so takes back the same estate he had when he made his will, it is a revocation; cites said cases of Arthur v. Bokenham, Parsons v. Freeman, and many other cases of fines &c. of little or no use here.

7 D. & E. 399,
Goodtitle v.
Otway.—1
Wash. 266.—
6 Cruise, 107,
116, 119.—6
Cruise, 109,
122.

§ 19. So if one makes his will, and after executes any legal conveyance of the whole estate to another, it is a revocation. As where he conveys by lease and release, to the releasees in fee, though it be only for the purpose of letting in a term, to secure a jointure, and the same estate, subject to the term, is limited back again to the grantor and his heirs, it is a revocation. And see Pollen v. Hubbard, 1 Eq. Ca. Abr. 412; Brydges v. Dutchess of Chandos, 2 Ves. jun. 417; and 595, Williams v. Owen; Swift v. Roberts, above; 6 Cruise, 115.

Pow. on D.
633, 634,
Onions v. Ty-
rer.—6
Cruise, 90,
93, 96.—
Cowp. 52.—1
P. W. 345.—
Pow. on D.
634.—3 Wils.
506, Titner v.
Titner; 635,
Bibb v. Thom-
as.—6 Cruise,
124.—6 Do.
94, 95, 96.—
7 Ves. jr. 379.
—Pow. on
D. 636, 637,
638.

§ 20. A second will must be good and valid in all circumstances, to revoke a former will. As if the witnesses to the second do not attest in the testator's presence, the first is not revoked; and no will is revoked by tearing &c., unless done *animo revocandi*. As if one deface his will entirely by throwing ink on it instead of sand, it is no revocation: and per Lord Mansfield, so if he burns his second will when he means to burn the first, by some mistake or accident. And if revoked or not, is like the question if devised or not, proper for a jury to consider. And on the other hand the least tearing, burning, or obliterating, *animo revocandi*, is a revocation. And the fact and intent may, and often must be, proved by parol evidence; as was the case of the will, the testator, meaning to destroy it, threw it upon the fire, having torn it a little, and when a little singed fell off, and was picked up and secretly preserved by a third person; the jury, on parol evidence of these facts, found it revoked. So if there be two parts to a will and the testator destroys on part, *animo revocandi*, the whole is revoked, though the other part be in the hands of a

third person. A codicil may revoke as another will does. 6 Cruise, 88.

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§ 21. So if the testator tear his first will quite to pieces, thinking he has made a second and valid will, and this be not so, but void, as not being executed according to the statute, the first will is not revoked, for this tearing was by mistake, and in relation to another will, and no *animo revocandi*. 6 Cruise, 90.

Pow. on D.
638, 639, 640,
Hyde v.
Hyde.—Oni-
ons v. Tyrer,
6 Cruise, 92.
—3 Mod. 258.

§ 22. The statute of frauds has not altered the nature of a will, in respect of the existence of a devisee capable of taking. A devise made since the statute in favour of a devisee incapable of taking, will still be a revocation of a former devise, and yet the latter devise will itself be void; and this upon a principle of the common law. And a will may be good as to part, though other parts of it have been obliterated by the testator subsequent to its execution.

Pow. on D.
642, 643, 644,
Sutton v. Sut-
ton.—6
Cruise, 97,
141.—Cowp.
812.

§ 23. It will be observed, by the revoking clause in the statute of frauds and perjuries, and by our statutes of 1692 and 1784, that the testator must sign the revoking instrument in the presence of three witnesses, but does not require them to subscribe in his presence. If the testator mean to revoke only, one executed in this way only will be valid to that purpose; but if by his instrument after made, he means to revoke his former will, and make a second will, and thus have a double character, he must, it is conceived, execute according to the requirements of both the devising and revoking clause, that is, as a revoking will he must sign it in the presence of the witnesses, and as a devising will or instrument they must attest in his presence. And as a first will is not revoked when a second is intended, unless this second be well executed; hence it seems to follow that the first is not revoked by the second, though formally executed as a revoking one, if not formally executed as a devising instrument. Sec. 28; and 6 Cruise, 93, 94.

§ 24. The estates devised under the will must remain unaltered till the testator's death, for any alteration or new modelling makes it a different estate, and occasions a different construction at law; and a feoffment, though void for some defect in the livery of seizin, is a revocation. And see Shove v. Pinche, above.

3 Atk. 798.—
3 Com. D.
368.—5 Rol.
616.

§ 25. In several cases a mere inoperation of a will is called a revocation of it. Hence it is stated, if one devise land and then is disseized, and dies before he re-enters, it is a revocation. So if one devise to A, and in the same will afterwards gives an estate to B, inconsistent with that to A, it is a revocation.

1 Rol. 616.—
Co. Lit. 112.
—3 Com. D.
370.

§ 26. In this case the devise was, if the testator died before

1 Wils. 243.
Parsons v.
Lanoe.

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§ 27. A duly executed his will, duly attested, and devised lands to two persons as joint-tenants in fee; afterwards he struck out the name of one of these devisees, and there was no republication. Held, the rasure was only a revocation, *pro tanto*. 3 Bos. & P. 16, 21; and 4 East, 419.

6 Cruise, 88

Two wills of the same date are void. And a codicil by proper words may revoke a will as an after will may.

6 Cruise, 89,
91.—1 P. W.
394.—3 Mod.
268.—6
Cruise, 89,
90, Eggleston
v. Speake.

§ 28. Another way to revoke a will is by a declaration in writing; but it must be attested by three witnesses, and signed by the testator, though they need not subscribe in his presence, on the 6th section of the statute; but an after will does not revoke, unless well executed as a will. A duly made his will and devised the estate to B; then he published another writing as his last will, in the presence of three witnesses, revoking all former wills; but they did not subscribe their names to the second will in his presence; this being invalid as a devise of lands, held, no revocation of the first. 1 P. W. 343, the same principle; 1 Ves. jun. 12; 3 Lev. 86, Hilton v. King.

3 Bos. & P.
16, 22, Lar-
kins v. Lar-
kins & al.

§ 29. A devise to three trustees and their heirs, of certain real estate upon trust to sell; some time after the testator struck out the name of one of the trustees, by drawing a pen through it. Held, this erasure was no revocation, as it was an alteration merely from a revocation, and no new gift to the other two. By the will they were joint-tenants absolutely. Was only a revocation *pro tanto* as to the trustee &c.

4 East R.419,
490, Short v.
Smith.

§ 30. Striking out one trustee, and interlining two others, did not revoke the will. As where A duly devised to two trustees, B and C, in trust for certain purposes; then *deleted* the name of B, and inserted the names of D and C, not altering the objects of the trust, though varying in some particulars, and did not republish his will. Held, no revocation, as his intention appeared to be only to revoke by substituting another good devise to other trustees; and as this could not take effect as to the alterations, for want of the proper requisites of the statute of frauds, it should not be deemed a revocation, but at most one *pro tanto*, as to the trustee whose name was *deleted*, leaving the devise valid as to C, the old trustee retained. 7 Johns. R. 394, 399.

6 Cruise, 106,
Sparrow v.
Hardcastle.
—7 D. & E.
416.—3 Atk.
798.—16 Ves.
jr. 519.—6

§ 31. Alienation of a part of the estate devised is a revocation for that part only. As where A devised all his manors, messuages, and hereditaments, whatever, to trustees in trust, &c.; he afterwards conveyed an *advowson*, whereof he was

Cruise, 107, 108.—Sudg. 134.—6 Cruise. 106, 111.—3 Atk. 803.

seized when he devised, and by another deed declared the trust of it. Held, this conveyance of the *advowson* was a revocation of the devise of it. And a covenant to convey may be a revocation in equity, though not at law. *Rider v. Wager*, 2 P. W. 328; and 622, *Cotter v. Layer*. So an alienation by a defective conveyance. See *Brydges v. Dutchess of Chandos*, *Goodtitle v. Otway*, ante, s. 19; 5 D. & E. 124; *Shove &c.*, ante, s. 3. *Quare*, as to turning a devised legal estate into a use, by an after conveyance. Lord Lincoln's case, 1 Eq. Ca. Abr. 411; 4 Burr. 1940; Dougl. 695. Devise of several estates, and then settled one of them; held, no revocation as to the others. 1 Eq. Ca. Abr. 412, *Clark v. Berkley*.

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Revocation as to part of the estates. A devised several estates, real and leasehold, to B, and some years after he suffered a recovery of several parts of them, and declared the uses to himself in fee. A's heir argued, it was a revocation as to said several parts. On reference, by Lord Camden, to the Common Pleas, that court held, the recovery was a revocation of the will, "as to the lands comprised in the recovery." So Lord Camden decreed, and "the House of Lords affirmed the decree as to this point." A conveyance of a part of the estate devised, revokes only as to that part.

6 Cruise, 113, 124—Ambl. 224, 653, *Darby's case*.—3 Wils. 6.—2 Ves. & Bea. 382, 385.

§ 32. Parol evidence is not admissible against a revocation, where a conveyance is made of lands devised, to shew the devisor means his will shall remain in force and unrevoked by his after conveyance, (*Goodtitle v. Otway*, 2 H. Bl. 516,) as no evidence can be admitted to "shew that deeds should have a different construction from that which the words imported." In *Brady v. Cubitt*, parol evidence was admitted to prove extraneous circumstances, as family changes &c., whence a revocation was to be presumed,—very different from the cases in which acts are done and deed made by the testator.

6 Cruise, 119.—2 Ves. jr. 606.—Where parol evidence is admissible in a case of revocation, 3 Hen. & M. 602 to 643, *Bates v. Holman exr.*

§ 33. A conveyance obtained by fraud, does not revoke a devise, as when set aside it is viewed as a mere nullity; nor does altering the quality of the estate without meaning to vary the quantity of interest, or the owner's disposing power. Hence if he devise his equitable estate, and then takes a conveyance of the legal one, this is no revocation; nor is the mere change of a trustee,—*Watts v. Fullerton*, Dougl. 718; 3 Atk. 749; *Doe v. Pott*, Dougl. 709; nor does a partition, 1 Rol. Abr. 616.

6 Cruise, 121, 123, *Hawes v. Wyatt*.—2 Ves. jr. 595, *Williams v. Owens*.

§ 34. Though a mortgage in fee is a revocation at law, in equity it is only *pro tanto*; and the equity of redemption goes to the devisee; and as our equity of redemption is in fact a legal estate, will it not, in such case, go to him by law, if not mortgaged to the devisee?

1 Vern. 329, *Hall v. Dunch*.—2 P. W. 334.

CH. 127. § 35. A lease for years not to the devisee, or a conveyance to raise money to pay debts, being but for a special purpose, does not revoke a prior devise, but only *pro tanto*. *Ogle v. Cook*, 2 Bro. R. 595.

6 Cruise, 125,
Vernon v.
Jones.—2
Ves. jr. 600.
3 P. W. 163,
Harwood v.
Turner.

§ 36. If one have a leasehold estate and devise it, and then surrender his lease, and take a new one, this is a revocation; for by the surrender he divests himself of all the estate devised.

ART. 9. *The same points continued: Eighth. How must a child be noticed in a will to be excluded a distributive share.* On this head nothing further need be said than to observe that any matter stated in the will by the testator, to shew he has not forgotten the child &c., is sufficient. And see Ch. 126, a. 2, *Terry v. Foster*, and *Church v. Croker*. The statute gives a share to the child not named in the will, or has not a legacy given to it, on the presumption the testator had forgotten such child; but this presumption cannot exist where the child is named by the testator in his will.

ART. 10. *The same points continued: Ninth. Residuum, and when is an estate devised or intestate.*

See Ch. 128,
a. 2, s. 8, af-
ter paying
debts, &c.—
See Ch. 125,
a. 3, s. 6.—
Ch. 125, a. 2,
s. 11.

§ 1. When a man makes his will and devises his estate in specific parts, and has no residuary clause, a part not included in the devises or bequests, will not be devised; and the question, if included or not, will generally be a question of fact; but if he specifically devises parts and then the *residuum* generally, all must be included, and devised, or bequeathed, except parts particularly but defectively devised or bequeathed, be not included in the *residuum*. For instance, the testator devises his lands to A, and bequeaths \$10,000 to Indians of America, incapable of taking, so this bequest is void, and all the residue of his estate to B. Shall this \$10,000 be part of this residue, and B have this bequest, or shall it be considered as not devised or bequeathed, and so to be distributed as intestate estate?

1 Wils. 138,
Wheeler v.
Bingham.

§ 2. In this case the court said, a devise of a *residuum* is not a devise over of a particular estate; for in devising a *residuum*, the testator has not in contemplation a particular thing. It may be observed, that when the testator devises and bequeaths particular parts of his estate, as his Milton farm, his black horse, or \$1000, he invariably understands these devises and bequests to be good, or he would not make them, then he must invariably consider the residue of his estate as not including them, and he dies intestate *quoad* them, if the will is construed according to his intentions. In contemplating the *residuum* of his estate, he clearly considers the devises and bequests he has in fact made, before he comes to the residue, never supposing part of them legally made, and part not, so

that those not legally made will fall into the *residuum*,—he can have no idea of the sort; he no doubt considers the *residuum* as the portion of his estate left after the parts of it previously disposed of *de facto*. Our statute of wills speaks of estate not devised or bequeathed, but not of estate not lawfully devised &c.

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§ 3. If an absolute legacy lapse by the death of the legatee, it shall not go to the residuary legatee, but shall be distributed. But see 4 Ves. jun. 708, 719.

2 Vern. 395.
—2 Com. D.
502.

§ 4. So if the legatee die in the life time of the testator, the legacy falls into the *residuum*, as a lapsed legacy, though absolutely bequeathed; but how could the testator view this legacy as a part of the *residuum*?

2 Bl. Com.
513.—Dyer,
59.

§ 5. Man bequeathed the use of his personal estate to his wife for her life, and after her death to A, B, C, and D, his brothers and sisters, equally, C and D died, living the testator, and then he died. Held, the statute of distribution takes place only “when the testator omits to make a disposition of any interest vested in him, as if he devises part of his estate, and takes no notice of the other part in his will, he dies intestate *quoad* that part not devised, and then the next of kin claims under the statute, and he shall have it; but when an interest has been once disposed of, and the party who would have taken it, had he survived the testator, dying in his life time, and the testator not making any other disposition of the share, he would have had in case he had survived the testator, nor any declaration shewing a design of altering his will, it is plain the testator, as he knew of the death of the legatees, did design that the executrix, his widow, should have the deceased legatees’ part,” and the survivors should not have them, “because the testator had particularly appointed that each of his legatees should have a special share.”

2 Stra. 905,
Man v. Man
—2 Com. D.
605.

§ 6. A devised his estates to his six relations, C, D, E, F, G, & H, in trust to perform his will, and to divide the remainder equally between them, making said six persons executors. C one of them died, living A. Held, his share should go to the next of kin to the testator, as intestate estate. Here a part of the *residuum* itself is a lapsed legacy, so not disposed of. In this case estate once disposed of in the testator’s will became intestate, and was distributed as such, according to the statute of distributions.

2 Stra. 820,
Page v. Page.

§ 7. A devised the residue of his estate to his executrix, or to her heirs &c., and she dies in his life time, he dies intestate as to the residue,—the same remark applies.


2 Atk. 86,
Stone v. Evans.—2 Com.
D. 606.

§ 8. A devised the surplus of his personal estate to B and his heirs, and on default of issue, at his death, to be equally divided among his sisters and their heirs. B died, living A,

1 Ves. 85,
Miller v.
Faure.

CH. 127. leaving a son. So the contingency did not happen, and this surplus did not go to the sisters, but was distributed as intestate estate, and was so because a contingent bequest failed.

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Doe v. Brabant.

2 Com. D.
606, Jackson
v. Kelly.

4 D. & E. 706. Lapsed devise though a republication ;—6 D. & E. 512, Doe v. Bagshaw, lapsed devise.

§ 9. A man disposes of all his estate, gives legacies and then the remainder in fifths, and appoints A his heir to whatever is not disposed of, and one of the five legatees dies in the life time of the testator, his share goes to A as part of the *residuum*. Here the lapsed legacy is carried to the *residuum*, and is not intestate estate.

§ 10. According to this and other cases it appears, that a part of the testator's estate devised or bequeathed by his will, may by events before his death become intestate estate, and this always when this part is a part of the *residuum*, as a part of that lapsed cannot sink into the *residuum*, according to Page v. Page, Miller v. Faure, Jackson v. Kelly, Stone v. Evans. But when the part so lapsed is not a part of the *residuum*, it then sinks into it or not, according to circumstances. Sinks in the *residuum* according to 2 Bl. Com. 513; but does not, but is intestate estate according to 2 Vern. 395; 2 Stra. 905. But so sinks if personal, not if real estate. 4 Ves. jun. 708, 633; see s. 12.

2 Com. D.
610.—1 Eq.
Cases Abr.
201, Attorney
General
v. Bury.

§ 11. So one may die testate as to part of rent, and intestate as to part of it due to him at his death. As if he devises all arrears now due from A, he dies testate as to all due at the time of making the will, and intestate as to all that becomes due afterwards, and before his death. This bequest relates to the making of his will. The same if he devises "all my corn now on my ground."

P. W. 698.—
9 Mod. 106,
Bateman v.
Roach.—
2 Eq. Cases,
Abr. 644, and
many cases
cited.

§ 12. It seems to be a settled principle of the English law, that where a legacy is bequeathed to be paid out of the real estate, or is charged upon it, and becomes a lapsed legacy by the death of the legatee, living the testator, it sinks into the real estate, and not into any *residuum*, and this for the benefit of the heir, and the testator dies intestate in regard to this legacy. And there is no difference whether given at a certain age, or to be paid at a certain age; but otherwise, if to be paid out of personal estate, then it does not lapse, if given to be paid at a certain age. This last rule, it is conceived, we apply to all legacies, making no difference between real and personal estate, and the distinction has been lately questioned in England.

7 Mass. R.
86, 87, Fisher
v. Hill.

§ 18. John Fisher, seized in fee, August 16, 1796, devised the premises to his wife for life, remainder in fee to Samuel Hill, jun., son of the deft.; said son died February 4, 1802, without issue and unmarried, and February 25, 1802, the

testator died seized; his will was proved, his wife entered, and died seized October 6, 1809. The demandant sued for $\frac{1}{4}$, as one of the heirs of the testator; and judgment for him, on the ground this was a lapsed devise to said son, Hill, jun. he dying, living the testator, and leaving no lineal descendants,—so his case was not within our statute of February 6, 1784,—and therefore, this remainder became intestate estate of the said testator, and accordingly descended to his heirs, of whom the plt. was one. This was the remainder of a certain tract of land, whether part of a general residuary devise or not, does not appear. If this remainder was a particular devise, and there was in the will a *residuum* generally devised to another, this case shews this lapsed devise did not fall or lapse into that *residuum* to the benefit of the general residuary devisee, but became intestate estate according to said cases, Vern. 395; and 2 Stra. 905, to be distributed among all the heirs of the testator on our statute of distributions. This was not estate omitted in the will, but devised in it absolutely in fee simple, and became a lapsed devise on the principles of the common law, and according to 2 Bl. Com. 513, it would have fallen into and become a part of a general residuary devise of all the rest of the testator's estate, and not estate intestate, and undisposed of by the will. But if this remainder was a particular devise, and there was a general *residuum*, as this remainder was legally devised when the will was made, this case does not settle the question whether a devise or bequest to those incapable of taking, void *ab initio*, shall become intestate estate, or sink into the general *residuum*. A question that has been made on the will of Mrs. Norris who bequeathed a great sum to a voluntary society, said to be wholly incapable in law to take it, and if so, the question is made, whether her heirs shall have it as estate intestate on our statute of distributions, or her residuary legatees, being personal estate.

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Mrs. Norris.

§ 14. In this case the testatrix devised a certain farm to two school districts, and held, this devise was void, as they had not a capacity to take. She also, devised all her estate not disposed of to the deft., her executor, of every description, yet he took not this void devise, but the heir at law took it, and the plt. recovered it under her deed to him of it. See ante, Ch. 125, a. 4; otherwise as to personal estate, 4 Ves. jun. 708; 5 Ves. jun. 495.

Mass. S. Jud. Court, Essex, Nov. Term, 1809, argued, Barker v. Wood.—1 Bos. & P. 562, Dunn v. Moore.

According to the best authorities the distinction is, that a gift void *ab initio* sinks sometimes into the *residuum*, but a lapsed legacy does not, but goes to the heir as intestate estate. 2 Bos. & P. 247, same case. Main question if a fee.

Page 300, the words, *not before disposed of*, mean the time of making the will. And if the devisee die in the testator's

Willes, 293, Doe v. Underdown.

CH. 127. life time, his lapsed devise goes to the heir at law of the
 Art. 10. devisor, and not to the devisee of all the rest and residue of

his real and personal estate not before given. As where Richard Morris, seized in fee of *gavelkind* land, one third whereof was in question, September 12, 1730, devised to William Underdown and wife, till their three sons attained their several ages of twenty-one, then devised to them in fee and common, each to enter as he came of age &c., or death of survivor of husband and wife, charged with £10 a piece to them for life &c. ; then devised certain estates to the husband and wife, then added a devise of the rest and residue and remainder of my goods, chattels, cattle, stock, ready money, plate, linen, bedding, and all other my estate whatsoever, both real and personal, not herein before given and bequeathed, I give and bequeath "to Mary Underdown in fee, daughter of said William and wife, subject to pay the legacies given;" one of the said three sons died, living the testator. The cause was argued several times, and decided as above, mainly on the intention of the testator, which "ought always to take place when it is not contrary to the rules of law." And this intent is "to be taken as things stood at the time of making his will, and is not to be collected from subsequent accidents, which the testator could not then foresee: and 3. "That when a testator in his will has given away all his estate and interest in certain lands, so that if he were to die immediately nothing remains undisposed of, he cannot intend to give any thing in those lands to his residuary devisee." To support this third rule, the court cited *Goodright v. Opie*, 8 Mod. 123; *Wright v. Hall or Horne*, 8 Mod. 222; and *Roe v. Fludd*, Fort. 184; in all decided a lapsed devise goes to the testator's heir at law, and not to his residuary devisee. In a note are eight cases more to the same purpose. But in all these cases it will be observed the estate was well disposed of and devised when the will was made, so that had the devisee survived the testator, he must have taken the estate. These cases, therefore, do not decide the case where the devise is void *ab initio*, as to a son of A where he has many, or to a society incapable of taking &c., where void, though the testator thinks it valid.

2 Wm. Bl.
 736, 740,
Smith v.
Saunders.

§ 15. The testator seized in fee, devised the lands in question to his eldest son, Henry, and his wife, and survivor, and after to his said eldest son and his heirs forever, and if they died without issue, then to the testator's right heirs forever; then devised to his son in law "all his estates, lands, tenements, and premises thereto belonging, not therein before devised, bequeathed," &c. in fee on certain trusts to pay debts and legacies, and to divide the residue among his children:

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Art. 10.

and then devised "all the rest and remainder of his estate, both real and personal, of what nature or kind soever," to said son in law, (lessor of the plt.) his heirs, executors, and administrators forever. Testator died February 21, 1754, leaving his eldest son Henry and heir, two other sons and five daughters; Henry died in 1769, and never had any issue. Judgment against the son in law, the general residuary legatee. De Grey C. J. said, "personal estate being of a fluctuating nature, must go to a residuary legatee in the same state it happens to be at the death of the testator. Not so real estates, which are of a more permanent nature; for there only such will pass by a residuary devise, as the testator really meant to devise at the time of making his will;" and cited *Doe v. Underdown*. "And a reversionary interest the testator then had will certainly pass by a residuary devise," (if nothing be mentioned of it.) It is always a question of construction, and the whole here is a question of intention; "and you never can infer an intention from a sweeping residuary clause, the intention of the testator is clearly, that his heir at law should have the land, failing the issue of his body." This was not going on the ground the devise to the heir at law was void. Noticed and approved the opinion of Lord Hardwicke, who held, the reversion in the case of *Amsbury & Brown*, that though the devise may not operate to make the heir at law take a reversion by purchase under the will, "yet it is in the nature of an exception out of the residuary clause." The other judges concurred; and Blackstone J. said, "whether the devise of the reversion to his right heirs could, in point of law, take effect or not, it is in fact devised." "And by such devise, *de facto*, it is excepted out of the general residuary clause." "The residuary devise would extend to any latent reversions he might have in him; but not to those which he expressly disposed of otherwise; unless there be some special circumstances, as in *Doe v. Russel*." This was real estate that had relation to the making of the will.

§ 16. In this case the testator devised his house in Edmon-
ton to Francis Carter and his heirs, and all the rest of his
lands &c. to John Lammas in fee. Carter died, living the
testator, so that his house became a lapsed devise. Held, it
should descend to the heir at law, and not go to Lammas, the
residuary legatee. Here too the devise to Carter was good
when made and of real estate. But page 222, "it was ad-
mitted that such a residuary clause would carry over a lapsed
legacy to the residuary legatee from an executor;" but doubt-
ed if from the heir—not to be disinherited, but by express
words or clear intentions. Page 223 is cited *Bennet v. French*,
said to stand alone. This "was a devise of lands in Gages,
8 Mod. 221
to 225,
Wright v.
Horne.
1 Leon. 261,
Bennet v.
French.

CH. 127. for the erecting and maintaining a free school, and a devise of
 Art. 11. other lands to T. S. and his heirs, and all his other lands to
 T. French, his heirs and assigns forever." Held, the devise
 to the school was void as there was no person to take it, and
 that it passed to French as residuary devisee, though the tes-
 tator's intention could not be collected to this purpose. But
 said there was not another case in the books to support it.
 This case, Bennet v. French, is directly opposed to that of
 Barker v. Wood, and to the opinions of De Grey and Black-
 stone in Smith v. Saunders, stating, that if an estate be devis-
 ed *de facto*, though the devise be void, it takes out it of the
 residuary clause.

Pow on D.
 409, &c.

§ 17. There are many cases in which it is held, a devise
 void as being to the heir at law &c., yet such devise does not
 fall into the *residuum*.

1 H. Bl. 223,
 227, Doe v.
 Chapman,
 cited 6
 Cruise, 193,
 201.

Held, a devise of "all the rest and residue of my estate of
 whatever nature or kind soever," included real as well as per-
 sonal property, though accompanied with limitations peculiarly
 applicable, and usually applied, to personal property alone.
 The cases in the books on the whole, seem to support the de-
 cision in Barker v. Wood, being a certain described real
 estate devised to the school districts *de facto*. But do the
 books at all decide Mrs. Norris' case, being personal estate
 and a general pecuniary legacy?

4 Ves. jr. 732,
 Shanley v.
 Baker.—8
 Ves. jr. 12,
 25, 588.

§ 18. In Shanley v. Baker, held, a leasehold house being
 to a charity bequeathed, and so bequest void, passed under a
 general disposition of the residue, and did not belong to the
 next of kin as undisposed of; this was personal estate. So
 was decided Brown v. Higgs, 4 Ves. jun. 708; and so Kennell
 v. Abbott, Id. 802. These decisions if correct seem to de-
 cide the point stated in Mrs. Norris' case, but these were not
 decided by any high authority, only by the Master of the Rolls.

Act, March
 8, 1792.

ART. 11. *Same points continued: Tenth. The effect of the
 recited clause in the act of March 8, 1792, 2d article, which
 provides, that a devise of any lands &c. to any person for his
 natural life, and after his decease to his children, or heirs,
 or right heirs in fee; such devise shall be construed an estate
 for life in such devisee, remainder in fee simple in such child-
 ren, heirs, or right heirs. This statute declaration puts at rest
 a multitude of questions and constructions that have arisen
 upon these and such words in wills, (for this act extends not
 to deeds.) The general construction of such words had been
 this, to wit: that words giving an estate for life to the ances-
 tor, remainder to his heirs or to his right heirs, and sometimes
 to his children, gave him a fee, for reasons stated in a former
 chapter, and of course a power to dispose of the whole estate
 as he pleased. This estate and power he still has under all*

conveyances but devises. But now by that provision he is limited in these by such words to a bare estate for life, and of course can sell or convey no greater estate; and as his children, heirs, or right heirs, can take nothing by descent from him, as he has no descendible interest in him, they must therefore take the remainder in fee as purchasers, and so not only the words, *heirs* or *right heirs*, but the word, *children*, are declared to be words of purchase in fee simple, and without the words, *and their heirs*, annexed to children; this then is taking by personal description, *descriptio personarum*. But what children, heirs, or right heirs,—those the devisee has at the time the devise is made, or at the time of the testator's death, or at the time of his own death? This question the statute does not answer. The fair construction seems to be, those the devisee has at the testator's death, for till then no remainder or estate under his will vests in them, children or heirs; then it vests in them, and there seems to be no good reason for making their estate open to let in after born children, or after made heirs of the devisee. Suppose this devisee at the testator's death has children and grandchildren, are the latter to take this remainder with the former? Perhaps the best construction is to consider children as *nomen collectivum*, at least to include the lineal descendants of children; and this the rather, because where no children, heirs are all made to take, then where there are children and grandchildren, who together are the heirs of the devisee, it is according to the general intention of the act to include all these heirs, both children and grandchildren; however we must wait for judicial decisions on the clause.

ART. 12. *Same points continued: Eleventh. What is a good republication of a will.* A re-execution is one—and so often is a codicil.

§ 1. A will or devise though revoked may be revived by republication; for being ambulatory during the testator's life, he may rescind it, or suspend, enlarge, or contract it at his pleasure; and as, before the statute of frauds, parol declarations were sufficient to revoke, so were they sufficient to republish a devise. "At common law very slight words effected a republication of a will, it being an act peculiarly favoured. As where

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6 Cruise, 129,  
138.—Pow.  
on D. 662.

Cro. El. 493,  
Beckford v.  
Farnecott.

§ 2. P. seized of lands in A, and having four daughters, viz. B, J, F, and M, made his will, and thereby devised all his lands in A to B and J, and constituted them his executrixes, and then purchased other lands in A. After which J. S. came to P., the deviser, and desired he would sell to him those lands which he had lately purchased; but he replied, no, "they shall go with my other lands in A to my executrixes;" and then he being sick, the will was read to him, and he said

**CH. 127.** nothing thereto. Held, what the deviser said to J. S. was a new or republication of his will. and by it the after purchased lands passed—for those words shew his intent.

**Art. 12.**  
2 Ch. R. 72,  
Cotton v.  
Cotton.

§ 3. This case of *Cotton v. Cotton* was the same in substance with the case of *Beckford v. Parnecott*. The testator said to one who proposed to buy of the testator the lands he bought after he made his will, but he said, no, he had made his will, settled his estate, and intended his wife should have the whole of it. The court inclined to consider these words a good republication of his will, and so as to pass the said after purchased lands. But see 7 D. & E. 482, lands purchased after the will made passed not by republication.

1 D. & E.  
485.

Pow. on  
D. 655.—  
6 Cruise, 132,  
but see s. 12.

§ 4. So before the statute of frauds any act of the deviser done subsequent to the revocation of his will, by which he demonstrated an intent that his will should stand, amounted to a republication. The codicil must be annexed to the will or shew the deviser meant to republish it.

Hussey's  
case.—Pow.  
on D. 456.—  
6 Cruise, 142.

§ 5. In this case, though held a subsequent feoffment to the use of the feoffor's will was a revocation of a will previously made, yet it was also holden, the reference of the feoffment to the will gave it effect, that operating as a new publication. A will actually cancelled must be re-executed.

P. W. 168,  
Alford v. Al-  
ford.—2  
Vern. 209.

§ 6. This was a devise of a lease afterwards renewed by changing a life, and a codicil was annexed to the will after the renewal, but this codicil took no notice of the will, yet it was held to be a republication of it. And a codicil not annexed to a will is a republication of it, if it clearly relates to the subject matter of the will, thereby clearly shewing that the testator contemplated that as his will at the time he made the codicil, and this since the statute of frauds.

Comyns, 381  
to 386, Ach-  
erly v. Ver-  
non, and 513  
to 523.—2  
Maule & Sel.  
R. 518.—  
6 Cruise, 130.  
See 16.—  
9 Mod. 78.—  
3 Bro. P. 85.  
—1 Ves. jr.  
486, Barnes  
v. Crowe, s.  
16.

§ 7. As where Thomas Vernon, January 17, 1711, made his will and therein devised real and personal estate to wife and sister, and niece, and to five trustees and their heirs, executors, and administrators, in trust to vest the residue of his personal estate in lands of inheritance, and to stand seized and possessed of his real and personal estate to the uses of his will during his wife's life, and after her decease, if he should die without issue, to the intent that his leasehold and freehold estate, and the lands to be purchased should be settled to the use of the deft., Bowater Vernon, for ninety-nine years, then to the first and other sons in tail male &c. Thomas Vernon purchased several fee farm rents, assart rents, and other lands and tenements; then, February 2, 1720, by a codicil he recited, he made his will January 17, 1711, and then said, "I hereby ratify and confirm the said will, except in the alterations herein after mentioned;" then varied some portions in it, then devised his after purchased lands to his trustees and ex-

ecutors named in his will to the same uses &c., as his manor of H. and the bulk of his estate, and revoked his will as to three of the trustees in it and named two others, and devised his said real estate accordingly. This codicil was signed in the presence of three witnesses. And Lord Chancellor Macclesfield, November 20, 1723, decreed that the will confirmed by the codicil was a republication of the will, and that "both together made but one will; and that by said will and codicil his lands &c. bought after he made his will, did well pass. The plt. appealed to the House of Lords, and stated five reasons of appeal, the last "that the codicil being by a separate and distinct instrument does not amount to a republication of the will." But the decree was affirmed. Thus the will was viewed as made when the codicil was.

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§ 8. So in this case it was held, a separate paper attested as "signed, sealed, and published, and declared by the testator as a codicil to his last will and testament," and referring to his will attested by three witnesses, was a republication of his will, though that was not at the time before the testator. 1 Ves. 437; 6 Cruise, 33.

1 Vern. 437,  
Potter v. Potter—3 Com.  
D. 365.—6  
Cruise, 130.

§ 9. It is now settled, that since the statute of frauds and perjuries, "no codicil can amount to a republication of a will of land, unless it comply with the forms thereby required, and be signed and published by the testator in the presence of three witnesses who attest the same." But in analogy to constructive revocations there may be republications wherever the analogy holds, "and this seems to be out of the statute," for where the republication is a conclusion from facts, and does not depend upon parol declarations, the case is considered as not within the statute. As in the case of a testator's making two wills, the latter of which is repugnant to the former, and of course a revocation of it; yet in that case if the testator destroy the last will and leave the first perfect and unobliterated, those acts taken together amount to a republication, because such transactions are not within the statute, not being opposed to the mischiefs it was intended to remedy." See 7 Ves. jun. 436; 14 Do. 596.

Pow. on D.  
664 to 667.—  
1 Ves. 437.—  
1 Ves. 137,  
Willet v. San-  
ford.—2 Ves.  
243.

§ 10. As to leasehold estates the law of republication remains as it was before the statute of frauds in England, and here also, except where the will purports to be both of real and personal estate, then by our statute of February 6, 1784, the republication must be attended with all the formalities necessary in cases of real estate. But whether the republication be at common law or on the statutes, there must be an *animus republicandi* clearly proved. There is no set form of republication; the words, "*I confirm my will*," are most usual, but any words that shew the testator's intention are sufficient.

Onions v.  
Tyrer, 1 P.  
W 343.—  
4 Burr. 2512,  
Goodright v.  
Glazier.—16  
Ves. jr. 253.  
2 Salk. 599.

Pow. on D.  
667 to 686.—  
Sugden, 136,  
137.

**CH. 127.** And according to some, every codicil executed according to **Art. 12.** the statute of frauds will amount to a republication of the will, though it relate only to personal estate and be not annexed to the will; for every codicil is undoubtedly a further part of a man's last will, whether it be said so in such codicil or not, and as such, furnishes conclusive evidence of the testator's considering his will as existing at the time," and then it confirms the will; and all codicils in law are annexed or fastened to the will and considered as a part of it. And Powell adds, this is the better opinion, and that the cases to the contrary "will be found of little weight; then mentions several loosely reported, or mere *obiter dicta*, and not necessarily arising from the cases. As *Litton v. Lady Falkland*, Lord Lansdown's case, *Cholmondly v. Cholmondly*, and these have been in substance overruled by the cases of *Acherly v. Vernon*, and *Potter v. Potter*.

*Barnes v. Crowe*, 1 Ves. jr. 486.  
—7 Ves. jr. 98.—2 Maule & Sel 5.—*Hulme v. Heygate*, 1 Mer. 285.—*Cro. El.* 493.

§ 11. When a man republishes his will, he applies the words of it as if then written *de novo*, as to his property he is then seized of, and the devisees named in it at the date of the republication; then the question is on a will so republished, what do its words import at the time of the republication, supposing them then to be first written, then they operate just "as if the testator had then made a new will." Hence it was held in *Beckford v. Parnecott*, that the words in the will being "*all the testator's lands in A*," and the new purchased lands lying in A, they were sufficient to pass them, the will having been republished after they were purchased.

7 D. & E. 482.—2 Bos. & P. 600.—6 Cruise, 137, 138, *Strathmore v. Bowes*.  
1 Will. 275.

So by a republication a person not in existence when the will was made, may be made capable of taking by it, if therein well described. But a codicil may confine the republication of the will to lands only in it, and not extend it to after purchased lands.

7 D. & E. 482.—3 Com. D. 369.

§ 12. As if one in his will give \$1000 to his son Joseph, he dies, and the testator has another son Joseph, and then he by codicil republishes his will, the second Joseph takes this legacy; the case is the same in effect as if the testator had written a new will at the time of the republication. But republication does not extend the words of the will beyond their natural import: therefore if the testator devise black-acre to B, and then purchase white-acre, and then republish his will, white-acre does not pass by it; for if he had written a will anew at the time of republication and devised in such words "black-acre," white-acre would not have been devised; the same may be observed as to the devisee, nor can the republication make persons take by purchase appointed in the will to take by descent. But a will not well executed when made, is not aided by a codicil that is well executed.

§ 13. As if A (among other things) devise his freehold lands to trustees and their heirs, in trust to maintain several poor scholars of such a college, and write the will himself, but it has no witnesses, and afterwards he adds a codicil, duly executed and subscribed by four witnesses, and therein notices his will. Held, this was a void will. But this case must be distinguished from *Carlton v. Griffith* above stated, of one entire will written at several times and in several parts, when the attestation to the latter part will give validity to the former, though that alone related to land.

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Pre. Ch. 270,  
Attorney  
General v.  
Barnes, cited  
6 Cruise, 55.  
—1 Com. R.  
384.

§ 14. So one may re-execute his will. As if a minor makes his will duly executed, and when of age re-execute it according to the statute, as before three witnesses, &c., the will is good and operates as if made when re-executed.

1 Sid. 162,  
Herbert v.  
Tarbell.—3  
Com. D. 364.

There is no need to republish a will to pass personal estate purchased after the will is made.

3 Com. D.  
364.

§ 15. It is a settled rule that a deviser must have a capacity to devise, not only when he makes his will, but when also it is consummated. The only exception to this rule is, that of a testator becoming after making his will *non compos mentis*. Hence in England if a feme sole make her will and devise her real estate and marries, her will becomes void, because by the 32 H. VIII. (statute of wills) a wife is disabled to devise her real estate.

Cancelling a  
second will  
republishes  
the first, 6  
Cruise, 141.

§ 16. Lands purchased after a general devise pass under it, a republication being implied from a codicil concerning personal estate, referring to the will, directed to be taken as a part of it, and attested by three witnesses: reliance was mainly on *Acherley v. Vernon*, and not on the Attorney General v. Downing. "Since the statute re-execution of the will is not necessary;" "nothing more is required than a writing according to the provisions of the statute expressing that intent," that is to continue his will, there need be no particular intent expressed to this purpose or to republish. This doctrine is confirmed in *Piggot v. Waller*. 7 Vesey jr. 98, 124.

2 Ves. jr.  
486, Barnes  
v. Crowe,  
cited 6  
Cruise, 133.—  
Walpole v.  
Cholmonde-  
ley. 7 D. & E.  
482.—2 Bos.  
& P 600,  
cited 6  
Cruise, 136,  
137, 139.

#### ART. 13. *Devise by implication.*

§ 1. If A devise land to his heir after the death of his wife, she has a life estate, for the heir is postponed, then she must take for life or the estate be in abeyance. So if there be a devise of one field to A, and another to B in tail, and if they both die without issue, then over to C in fee, here A and B have cross remainders by implication, and C's remainder over shall be postponed till the issue of both fail. And generally all estates by implication must be necessary, or at least highly probable, and not merely possible. But an implication cannot be against a general intent in a will.

Freem. 484.—  
2 Bl. Com.  
381.—Doug.  
498.—3 Burr.  
1634—5  
Burr. 2608.—  
6 Cruise, 181.  
—Fearn,  
263.

§ 2. So if he devises to A his son for life, and after the

8 Com. D.  
Devise, N. 12.

**CH. 127.** death of A and his wife to the next heir of A, the wife of A takes for life. And so if one devise to A till his daughter and heir attains 16, and if the daughter dies, B shall have it, she takes for life by implication. So one having two daughters, his *coheirs*, and devises to one after the death of his wife, she takes by implication for life. So if a man devises goods to his wife, and after her death devises his house to his heir, she has a life estate in the house by necessary implication, though goods were devised to her. So if a man devise lands, "which he has before given to A," over to B on a certain event happening: though in fact, he had not before given these lands to A, this is a devise to A by implication. See also *Robinson v. Robinson*, 1 Burr. 38, estate tail by implication: cited Ch. 125, a. 4.

5 Burr. 2608,  
*Roe v. Sum-*  
*merset*.—2  
W. Bl. 1014.—

§ 3. So A having leasehold estate for lives, devises it to his daughter Mary after the death of his daughter Betty, the next *cestui que vie*, this is a devise to Betty by implication. See *Doe v. Applin*, an estate tail by implication, Ch. 129, a. 2.

8 D. & E.  
513, *Bean v.*  
*Hally*.

§ 4. A devise is made to A for life without impeachment of waste, remainder to his eldest son and the heirs of such eldest son, and in default of issue male of A then to B &c. A takes an estate for life, remainder to his eldest son in tail, remainder to himself in tail by implication. For the intention plainly is that B is not to take while A has issue, and is to take on failure of that issue.

See *Newhall v. Wheeler* above, where trustees took a fee by implication to make their estate commensurate with that of *cestui que trust* in fee.

2 W. Bl.  
1041, *Good-*  
*right v. Allen*.

§ 5. Testator seized in fee of the premises, devised a life annuity to A, to be paid by my executor after named, with a general devise of a copyhold to B, appointed executor and residuary legatee of his personal estate, he paying debts and legacies; this gives B a fee simple in the copyhold, though the words were but a devise of his lands, house, residue of his goods, chattels, debts, mortgages, leases, and personal estate, by implication, because the debts &c. were a charge on the real estate also, and the payments were of uncertain duration, so required a fee simple to answer them.

3 Burr. 1684.  
*Oates v.*  
*Cooke*.—1  
W. Bl. 543.  
1 Ves. 485.—  
7 D. & E.  
640.—7 *East*,  
99.—6  
*Cruise*, 264,  
265, *Gibson*  
*v. Montfort*,  
Ch. 114, a.  
16, s. 11.—

§ 6. George Beaumont seized in fee of the premises, devised £3 a year to several persons, some for life, some in fee, and one life expressly to be paid by his trustee and executor, leaves a sum for repairs of the farm, a sum to build a tomb, and he and his heirs always to see it kept in order, directed a bed always to be kept for him in the house to use as he pleased, he paying all his debts &c. Held, this trustee and executor had a fee by implication. The testator left the lessor of the plt. and three other nephews his *coheirs* at law. And

**Yates J.** said, "the estate must be co-extensive with the charges, and here are annuities charged upon the estate and devised in fee." And **Wilmot J.** said, "here are trusts to be executed, which the trustee could not execute and effectuate, without having an estate in fee devised to him." (Same principle as in *Newhall v. Wheeler*.) 5 East, 162.

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§ 7. **Yates J.** An implication of a limitation can be made only in order to effectuate the testator's intention, and it must be a necessary implication to that purpose. 4 Burr. 1932

But lands do not pass in a will by possible and constructive implication, for the heirs shall not be disinherited but by a necessary implication, nor the executor lose his right.

§ 8. **W** leased the premises for years to one, on condition he should not alien to any but his children. The lessee devised part of his term to his son after the death of his wife, and made **A** and **B** his executors. Held, this was no devise to the wife by implication, for the law shall construe it a devise to her, when it intends the testator meant it for her, "and to none other in the mean time." But here there cannot be any such construction, for it may well go to the executors in the mean time. But if the devise had been to the executors of this term for years after the wife's death, she might have had it in the mean time; for then it could go to no other; but had he devised it to his executors as legatees, after her death, then she could not have had it, for then they might have taken it in the mean time as executors. Cro. Jam. 74, Horton v. Horton.

§ 9. So if **A** devise for twenty years underwood as a provision for younger children, after his wife's death, the heir has it during her life; for it is consistent with the devise for him to have it. 1 Vern. 22.—3 Com. D. 417.

§ 10. There is no devise by implication against express words in the devise, as there can be no intendment against words clear and express. 1 Salk. 226.

§ 11. If a man gives the use and occupation of a house and fields, with the furniture, to his daughter for life, makes the furniture heir-looms, then gives the house to her, generally for life, without impeachment &c. and after her death the premises with all other real estate to **A**, the two first clauses are co-extensive, and she has only the use and occupation, but has no estate by implication in the house &c., nor in the rest of the real estate. 2 Ves. 277.—3 Com. D. 417, Boon v. Cornforth.

§ 12. **A**, being seized in fee and having issue **B** and **C** by two wives, covenants to stand seized &c. to the use of his heirs males begotten on the body of his second wife, reversion to his own right heirs; held, an estate for life did arise to **A** by implication, because a limitation to the heirs of his body carries the use to himself, in whom his heirs are all included. 4 Mod. 154.

## CH. 127.

## Art. 14.

9 East, 306,  
310, Good-  
right v Hos-  
kins.

§ 13. Leasehold estate devised by the testator to his son Richard till his eldest son T was 21, and no longer, but if T died a minor then to J and O, his younger brothers, or either surviving or attaining 21 as aforesaid, with a desire Richard would quit and deliver up possession of the premises as aforesaid, and confirming the bequest of them to R's family on his releasing a certain claim, which he did release. Held, T on attaining 21 took an estate by necessary implication, though there was a devise of the residue to N, the younger brother of R.

Willes, 369,  
374, Good-  
right v. Good-  
ridge. Many  
cases cited.

§ 14. John Goodridge devised to his wife for life certain lands, then added, "if my son Richard (eldest) happen to die without heirs, then my son John shall enjoy my lands." Held, R. took only an estate tail by necessary implication, though in words no such estate was devised to him: 2. On his death without issue, John was entitled to the lands. See Ch. 114, a. 24, s. 11.

8 Ves. jr. 302,  
491, Scott v.  
Chamber-  
lain.

§ 15. A devised lands in fee and gave personal estate to his grandson, and in case of his death under 21 without leaving issue, then to the testator's granddaughter. He afterwards by codicil affirmed his will in all respects, except he directed his grandson should not take till 25. He died between 21 and 25 without issue. Held, the granddaughter could not take. The codicil made no alteration in the will as to the interest or estate, but only as to the grandson's age when he should be entitled to take, still it remained a condition precedent to her taking, that he should die under 21 and without leaving issue.

Chapman's  
Case, Dyer,  
333.

§ 16. A house was devised to three brothers, among them, provided always that the house be not sold, but go to the next of the name and blood. Held, the devisees took estates in tail by implication.

1 P. W. 753,  
769.

§ 17. An estate is limited to A for life, remainder over to B on A's death without issue male, A has a fee tail male by implication.

1 P. W. 54.

§ 18. Where an estate is expressly given to A for life, it shall not be enlarged into an estate tail by implication. *Bainfield v. Popham*; this principle, *Blackborn v. Edgley*, 1 P. W. 600, cited 6 Cruise, 298, 299, is questioned. And see *Robinson v. Robinson & al.*, Principle in *Bainfield v. Popham* was adopted in *Goodtitle v. Wadhull*, cited 1 Burr. 45, words were for life only; and 6 Cruise 301; 3 Leon. 71; 4 Leon. 41. By implication arising from a schedule annexed, 2 W. Bl. 698.

ART. 14. *Who may be deviser or devisee.*

§ 1. On this article but little need be added, as in the preceding articles many cases have occurred, in which it has appeared who may or may not be deviser or devisee. Also

the chapter respecting contracts, such persons only being able to devise, who can contract. See also *Mortmain*. See also *Art. 14.* *Aliens, Baron & Feme, Minors, Persons non compos, &c.* in former chapters, and generally. CH. 127.  
Art. 14.

§ 2. *Who may devise.* Generally an alien cannot any estate of inheritance or freehold ; nor can a *non compos* of the above description ; nor idiot ; nor an infant under twenty-one years of age, as before stated. In regard to personal estate, and chattels, our law is different from that of England in this respect. Nor can a *feme covert* make her will during coverture, unless empowered by her husband to make an appointment in the nature of a will. But see *Baron & Feme*.

§ 3. In this case it was decided, that a *feme covert* may make a will of her separate personal property, held in trust for her, and of the produce of it, whether such separate property be derived from her husband or a third person ; but if she makes no disposition, her husband succeeds as next of kin, and not in consequence of the marital rights ; and she has the power with all the incidents, and the *jus disponendi* is one of them. 3 Br. Ch. R. 8. 1 Ves. jr. 46,  
Fettiplace v.  
Gorges.—8  
Ves. jr. 689.  
—9 Ves. jr.  
369.—Ch. 19,  
a. 22, s. 15.—  
Pow. on D.  
139.

§ 4. All persons may be devisors who can convey, not disqualified at common law, or by the express words of the statute of wills ; but *all persons* here does not include persons dead in law, nor bodies politic ; these cannot devise, and no corporation aggregate, or other, can devise by any law. As to personal disqualifications, they may be positive or negative, natural or civil ; the positive are, coverture, minority, idiocy, and non-sane memory. Our statutes empower persons of age, and of sane mind, to devise, but say nothing as to *feme coverts*, though undoubtedly meant to be excepted out of the statute. And in “the construction of statutes, the mere letter is not to be considered, but the internal meaning and sense of the legislature therein ; for sometimes cases within the letter of the statute are not within the sense thereof ; the sense sometimes being more confined and contracted than the letter, and sometimes more large and extensive ; this extending or diminishing the operation of the words of a statute, is called, in law, construing it according to the equity of the statute.” Therefore when the statute of wills empowers all persons of age and of sane mind to devise, the equity of the law corrects these general words, and restrains them so as not to include married women, though of that age and of sane mind ; though the English statute of wills named them.

And what is a sound mind in the testator, capable of making a disposition of his estate with reason and judgment, is a matter to be decided upon the principles of the common law. The incapacity of the wife to devise or bequeath arises not

CH. 127. from want of understanding or memory, but from want of *free*  
 Art. 14. will, being continually, in contemplation of law, under the  
 ~~~~~ control of her husband, and having no will but his ; for these  
 reasons she cannot devise to him, as in this her act would be
 his. In many places in England a *feme covert* may devise by
 custom ; but we have no such custom here ; but it is understood
 the rule of law in England, that she can make a will, if her
 husband be banished for life, is law here, being a part of that
 common law our ancestors brought with them to this country,
 and adopted in it, from the necessity of the case ; for where
 he is so banished, she must of necessity be allowed to act as
 a *feme sole*, he being dead in law, (*civiliter mortuus.*) So
 no doubt that part of the law of England which enables a
 married woman to make an appointment of her estate in the
 nature of a will, by her husband's consent, has been adopted
 here, and has been practised upon, as in the case of Mrs.
 Russell, and in many other cases. So if the husband be im-
 prisoned for life, is he not *civiliter mortuus* ? Held in New
 York he is so.

But see Ba-
 ron & Feme,
 Ch. 19.

§ 5. Another inability to devise rests on a want of freedom
 of will, as where the testator is under restraint, duress, or men-
 ace of imprisonment.

So where a man makes his will in his sickness by the over
 importunity of his wife, to the end he may be quiet, this is
 restraint, and the will is void ; but this restraint must be im-
 proper, and clearly so ; there must be undue importunity, or
 undue restraint, and what is either in any case must depend
 on circumstances ; there can be no precise rules laid down in
 this respect, though cases already decided may in some meas-
 ure serve as guides.

§ 6. The principle is clear, that he who is under undue in-
 fluence, whether from importunity, persuasion, flattery, or res-
 traint, cannot make a valid devise or will.

Roberts v.
 Winn, Pow.
 on D. 171,
 172.

§ 7. *Cases.* B devised his lands to his daughter's children
 in tail. After this he made another will, and thereby gave
 one part of his estate to W, and another part to a remote re-
 lation. And it appeared this will was obtained by great
 fraud and circumvention ; for that W got into the deviser's
 acquaintance, then very infirm, by pretences of some little
 affair of friendship and kindness, and got him away from his
 friends and relations, and during his sickness, by false stories,
 drew his affections from his daughter, and kept him in secret
 places, that no friend might come to him ; and that this will
 was made while he was so secreted and wrought upon, where-
 by he gave his estate away from his child to a stranger.
 Lord Clarendon, assisted by the judges, unanimously held, that
 " this will was obtained by fraud and practice," and that there

was great reason if they could to relieve against it ; but that on search of precedents, none could be found that would come up to the case, and the bill was dismissed ; this was in chancery too, and to the prejudice of the heir at law, who had never given any cause to be disinherited ; but she was relieved by act of parliament, made for the purpose. Almost the only case to be found in which full effect has been designedly given to acknowledge fraud and practice ; as to precedents, every new case must be without precedent.

This case, if rightly decided, shews how strong and clear the influence must be, to render the testator incapable of making a will, or his will void, or how far undue influence must be carried.

§ 8. It is a general principle, that if the idiocy, infancy, coverture, non-sane memory, or duress, or menace of imprisonment, exist at the inception of the will, it will be absolutely void, though the disability be actually removed before the consummation of it by the death of the testator ; for a devise or will is such from the making, and hence then the parties to it must be qualified and have ability ; and what is void in the beginning cannot by lapse of time become valid. And if the testator be imprisoned by A, till he promises to make a will in A's favour, or in favour of such persons as A names, or shall name, and then after at large makes a will, it is void, for the same reason, that if one so imprisoned promises to make a bond, and then when at large makes it, the same is void by duress, and he may plead *per duress*. But then the want of ability at the time of making the will, may be remedied by executing it after the disability is removed, as after the minor comes of age &c. ; but then this new execution must be with all the formalities required by the statutes of wills, and such as would make a new and good will at the time. Therefore if one in the time of his disability make his will, and then after it is removed declares his will shall stand, it is to no purpose. 6 Cruise, 15 ; also 6 Cruise, 12, &c. the disabilities already stated.

§ 9. So a joint-tenant is unable to devise, because the survivor has the land by survivorship, and prior title ; nor can one disseized devise, as before stated, or not being seized. See a. 2, s. 19.

§ 10. *Who may be devisee, and by what description.* It is not necessary to add much on this head, as many cases on it have already been occasionally stated. Generally all persons may take by devise who may take by grant. So a *feme covert* may take by the devise of her husband. And so may an infant *in ventre sa mere*, and till its birth the land shall descend to the heir. This point was long doubted, but now seems to be settled

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Art. 14.



Dyer, 142,
Putbury v.
Trevilian.—6
Mod. 85.—11
Mod. 157, in
Archer's
case.

Herbert v.
Torball, 1
Sid. 162.—
Salk. 238.—
11 Mod. 157.

Hawe v. Bur-
ton.

Pow. on D.
173, 174.

1 Roll. 610.—
1 P. W. 342.
—2 H. Bl.
399.—Ray.
163.—1 Lev.
135.—2 Mod.
9, 292.—Co.
L. 390.—
Cowp. 40, 43.

CH. 127. that such a devise is good. See Pow. on D. 323 to 330 ;
 Art. 14. but the rule holds not as to bastards, 38 to 40.

4 Cruise, 15, § 11. So every one shall take as devisee, who is named
 &c.—Ray. 82. with such certainty, that the person may be known, though he
 3 Com. D. does not take immediately upon the death of the testator.
 379.—6 As a devise to one of the daughters of B, who marries a Nor-
 Cruise, 184, ton within fifteen years, the first daughter who so marries shall
 Bate v. Am- have it.
 herst.

1 Co. 16 to § 12. In the following cases, (among many others,) the de-
 26, Porter's visees have been deemed well described, and so as to take.
 case; explai- Poor men and poor women, in case of a charity, were *cestui*
 ned, 4 Wheat. *que trusts* ; but could such trust be enforced before the 43d
 33, &c. of El. ?

10 Co. 1, 37, § 13. This was a case in the King's Bench and Exchequer.
 case of Sut- This was a devise "for finding support and relief of poor,
 ton College. aged, maimed, needy, or impotent people," and a free
 school for poor children and scholars, &c.—were *cestui que*
trusts.

4 Ves. jr. 11, § 14. This was a devise, A. D. 1719, "to trustees for poor
 Attor. Gen. v. men and poor women," in A. Good as a charitable devise.
 Minshall. So a devise is good, though to put out poor children, as the
 trustees thought fit ; and the increase of the fund applied to
 the charity against the heir's claim.

Mass. statute, § 15. This Boylston donation in his will was to "aged poor
 ch. 44, Feb. persons and orphan deserted children," and held to be good,
 3, 1803. and the legislature passed an act to appoint trustees, and to
 give it effect ; and there were no trustees or corporation ap-
 pointed till long after the testator died.

1 Ves. jr. 464, § 16. This was a devise to one Baston, desiring him to
 476, Mog- dispose of such charities as he thought best, recommending
 gridge v. poor clergymen with large families and good characters. Bas-
 Thackwell. ton died nine years before the testatrix, who had notice of his
 death. Held, Baston could not claim this estate for himself.
 The estate is "given to him only for the purpose of erecting
 the charity," and "so at all events he is trustee." Held, a
 trust legacy cannot lapse because the trustee dies ; but it sur-
 vives for the benefit of *cestui que trust*. See 4 Wheaton's R.
 1 to 51, App. 1 to 23.

6 D. & E. § 17. The court in this case held, that any description by
 679, Thomas which the devisee may be known is sufficient, any words what-
 v. Thomas. ever by which the person intended as devisee may be ascer-
 tained.

Hob. 33, § 18. In this case the court decided, that a devise to the
 Cowden v. stock, family, or house of A, is good. The heir is intended,
 Clark. or will be understood, in order to effectuate the testator's inten-
 tions.

§ 19. In this case the court held, that a devise or gift to the poor of a hospital, though not incorporated, is sufficiently certain : cites *Dukes on Charitable Uses*, 81, 115. And so the gift "of the surplus of the estate for the good of poor people, without saying whom," is sufficient ; cites *Vern.* 225. CH. 127.
Art. 14.

§ 20. So a devise to the legal poor of a parish, is good. So is a gift to the parishioners of D ; so for repairing bridges ; so for poor seamen ; and in all these cases of an indefinite multitude, if the testator do not appoint trustees, the proper court will, to hold the estate and execute the trust. 6 Com. D.
Uses, N. 11,
p. 453.
6 Com. D.
Uses, N. 11,
12.

§ 21. It is now held by construction of 43 El. c. 4, "that a devise to a corporation for a charitable use is valid, and is much favoured." Hence, on this act a corporation may be devisee. 2 Bl. Com.
376.—Pow.
on D. 314,
315.

§ 22. Devises void because the devisees are not certainly described, are only strong cases ; as of a devise of half of certain estates "to my wife's family," and half thereof "to my brother and sister's family," when the testator had many relations and two sisters' families. 3 East, 172,
Doe v. Joinville, 278,
294.

§ 23. And generally the devise is void, for the uncertainty of the devisee when the description cannot come within the rule of *certum est ad certum reddi potest* ; as in *Doe v. Joinville* ; also where a devise is to A's issue, for it is uncertain and cannot be ascertained what issue of A is meant. So to A by a name with a description applicable to B, is void for the same reason. Taylor v.
Sayer, Cro.
El. 742.—6
D. & E. 671.

§ 24. So to twenty of the poorest of his kin ; so to the better men of B is void. So to the poor of a parish is void for the uncertainty of the devisee, 10 Mod. 94 ; to A's posterity his lineal heir takes. 2 Eq. Ca. Abr. 290. 3 Com. D.
583.—Cro.
El. 743.

§ 25. If there be an immediate devise to children, only those can be devisees who are born when the will is made ; but if a remainder be limited to them or on a contingent event, and certain, those will be devisees existing when the estate vests. A devise to A's oldest son is good, though called William in the devise, and his name is Andrew. 7 East, 799 &c. Cowp. 309.

§ 26. Married women may be devisees, but if their husbands afterwards disagree, that will avoid the devise, yet equity would interpose in such case and prevent a husband from prejudicing his wife, by dissenting to her taking a benefit under a devise. And Perkins, sect. 43, 44, holds, a conveyance may be made to her on the same principle. So she may be a devisee to her husband, though she cannot be grantee under him ; he and she being one person in law. This does not apply in cases of a devise, as it does not take effect till after his death when they are no more one person. Pow. on D.
315.—Co.
Lit. 112.

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2 Ves. 360,
Knight v.
Duplessis.—
Pow. on D.
316, 317.—
Dyer, 323.

Dyer 323,
Lingen's
case.

Pow. on D.
340.

Moore, 10.—
Noy's R. 35.

2 Eq. Cases
Abr. 290 —
Pow. on D.
347, 348.

Cro. El. 532,
Bon v. Smith.

Cro. El. 576,
Jobson's
case.

1 Ves. 335,
Pyot v.
Pyot, cited
6 Cruise, 137.

§ 27. So an *alien qua* such may be devisee and take for the use of the king, or here the Commonwealth; but he will retain the estate till taken from him by an inquest of office. Sec Alien. The devise or conveyance to the alien carries the estate from the devisor or grantor forever, and if the alien cannot hold it, then it goes to the public on proper process. But an alien has no heirs, hence on his death the estate goes to the public; but by our statute of March 12, 1806, his personal estates to his wife. On the whole, an alien's title by devise or grant is not affected till office found; several cases, their rights in equity, New. on Con. 31, 32, &c.

§ 28. So one may be devisee though his name or description be but by reputation. As if one devise to Jane, his daughter; Jane, his illegitimate daughter, will be devisee, if she has the reputation of being his daughter. So a woman may take as devisee by the name of the wife of A, though she be not his lawful wife, if she be reputed and known by that name.

§ 29. And it seems to be the better opinion, that if a man have legitimate and illegitimate children both, and devise to his children generally, only the former are the devisees. Though said by some that if a woman have such and so devise, they all take; but this may be doubted.

§ 30. So one may be devisee by a very general description. As where the testator devised lands to the posterity of A; the lineal heir is devisee and takes under this word, *posterity*; but if A have no lineal heirs, the collateral heir of the whole blood is the devisee.

§ 31. A had a son and daughter and devised land to his son in tail, and if he died without issue, remainder "to the next of his name." The son died without issue, the daughter being married. The court held, the land should go not to her, for she was not of the testator's name, but "to the next heir male of the name," but if she had not been married, then she would have had it.

§ 32. Devise of a remainder "to the next of his kin of his name," at the time of the devise the next of his kin was his brother's daughter then married to J. S.; held, she could not have the land, but should, if unmarried when the devise was made and the testator died.

§ 33. So one may be devisee by the description of next of the name of the testator or nearest relation of his name; and operates as *nomen collectivum*, and when so, all the testator's family, that are nearest to him in the degree mentioned are included. The testatrix devised an estate "to her nearest relations by the name of Pyot, and to his and her heirs, executors, administrators, and assigns;" when she died there were three Pyots, a man and his two sisters unmarried, also an-

other sister of that name, but married when the will was made ; when the event happened (prior estate ended) on which this estate vested, there was another person heir at law to the testatrix and named Pyot, but not so near akin as the others. Lord Hardwicke said, "that a devise was never to be construed absolutely void for uncertainty, unless from necessity ; that this was uncertain if confined to a single person, as there were several in equal degree by the name of Pigot ; but he held, the term "*relation* was *nomen collectivum* as much as *heir* or *kindred*." "The Pigots described a particular stock, and the name stood for the stock. Adjudged to the three relations, the man and two sisters not married when the will was made, though married before the contingency.

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§ 34. It appears to be a rule in the English courts, where the property devised is in its nature a subject of the statute of distribution, to construe the word, *relation*, or *kindred*, when not controlled by any other words, to mean the same as *next of kin*, and as all our property is such a subject, it follows we ought generally so to construe either word. And the wife is not a relation to her husband, as she is not of his blood ; and relations mean those of blood only. A devise to one by the name of Mary, is good, though her name be Elizabeth, if the jury find she was intended. 3 Ves. jun. 322 ; 6 Ves. jun. 42. So Margaret mistaken for Margery. 1 Freem. 293, *Gynes v. Kemsley* ; 10 Mod. 371 ; *Plow. 344* ; *Prec. Ch. 175* ; *Hob. 29, 30* ; *Finch, 403*.

1 Ves. 64,
Davies v. Bailey.—
3 Atk. 759,
Worseley v. Johnson.—
2 Eq. Ca. Abr. 332,
363, *Brown v. Brown*.—
7 East, 299,
Doe v. Danvers.

§ 35. There are many subjects in England to which devises and wills relate that do not exist here, and which occupy a large portion of the English law books ; such as ancient *demesne* lands, Borough English estates, their commons, their copyhold estates, frankalmoigne, and *gavelkind* estates, distinctions of half and whole blood, &c. &c.

§ 36. There are many other matters which some writers on law subjects bring under the head of devises and wills ; as words in them that give a fee, fee tail, life estates, &c. estates in possession, remainder, and reversion &c., and in parcenary, joint-tenancy, and in common ; estates fee simple, conditional, for years, at will, or sufferance &c., estates by executory devise, in mortgage &c., the probate of wills and probate divisions of estates ; and many other matters which in this work are treated under their separate and several divisions.

§ 37. If a will here purport to dispose of both real and personal estate, though in fact it embraces only personal, as did Mrs. Norris' will, it must be as good to both or neither. It has been said, hence has come the notion of making the probate of the will final. "One trial here closes all questions on the formality of the execution and of the capacity of the testator."

Sul. 134, and
1 Stra. 619.

CH. 127. This is said to be peculiar to this State. The form of proceeding shews how the question of sanity is tried. The lower Art. 15. Probate Court, when the testator's sanity is in question, approves or not the will, on a hearing of the parties; the party dissatisfied appeals to the Supreme Court of Probate, and this court states: "and now it appearing to the court here from the reasons of appeal, that the sanity of the testator is a question of controversy between the parties in the cause, the court direct a feigned issue to try the same by jury," (or it may be a real issue formed by the pleadings;) "whereupon the said John Flint reserving all other objections to the probate of the instrument hereto annexed as the last will and testament of the said Jonathan Flint, for plea saith, that the said Jonathan Flint at the time when the same was executed was not of sane mind, and this he prays may be inquired of by the country;" "and the said Jonathan Smith likewise." The verdict was, "the jury find the said Jonathan Flint at the time when the said instrument was executed was not of sane memory, as the said Jonathan Flint in his plea hath alleged." The judgment of the court was, that the will was not approved and allowed as the last will and testament of the said Jonathan Flint.

Jonathan
Flint's will,
Middlesex,
Oct. 1800.

2 Vern. 545,
Cook v.
Cook.—Cro.
El. 532, 576.
—6 Cruise,
397.

§ 38. The word, *issue*, is a good designation of the devisee in a will; hence, a devise to the issue of A will pass the estate to all the children and grandchildren of A; cited 6 Cruise, 186, and the estate will open and let in a child born after the testator's death. So sons and children may be devisees, cited 6 Cruise, 187. So *heirs* is a good description of devisees. *Goodright v. White*, Ch. 125, a. 5, s. 15. So is the word *descendants* of A.

ART. 15. *Description of the thing devised.*

§ 1. But rarely has a devise been held void on this account; for whenever the testator has used any words shewing his intentions to devise to any one, all courts have presumed he meant to devise some beneficial interest, and whenever this has been by him imperfectly described, they have liberally construed his description to effectuate his intentions; and when he has not had the kind of property he has given and described in his will, courts have inquired after other property he must have intended; and to this end, the situation of the testator, the number of his children, and the different kinds of his property, he may be seized of when he makes his will, &c., are circumstances from which arguments may be drawn, as to his intentions; and of course such extraneous matters must be proved by parol or other evidence; and it is settled, that the same words may have a different construction when applied to different kinds of property, always observing the rules of law.

6 Cruise, 158,
&c.—2 Ves.
616.—*Doe v.*
Fyldes,
Cowp. 838.—
2 Burr. 1108.

§ 2. The testator used words applicable in their strict technical sense to a species of property he had not, and the court applied them to some other species of property he had, in order to give effect to his intentions; as he must have had some intention when he used them, it has ever been deemed proper to apply them to the thing to which he must have meant to apply them. As where A devised his manor of F, to B, and had no land, but was seized of a fee farm rent, issuing out of the manor of F; held, these words passed this rent; for he could mean nothing else. CH. 127.
Art. 15.

§ 3. So A devised his freehold houses in Alders-street to the plt. and his heirs, and had only leasehold houses there. Held, they passed; though otherwise in a grant. And in case of a will, if there had been any freehold houses there to satisfy it, the leasehold houses could not have passed. Better so to construe the words *freehold houses*, than to make the will wholly void. See *Adis v. Clement*, 2 P. W. 456. Inchly v.
Robinson,
cited 6
Cruise, 190.
1 P. W. 286,
Day v. Trig;
cited 6
Cruise, 190,
207.

§ 4. So a mistake in describing the place where the lands devised lie, will not invalidate the devise. *Pacey v. Knolls*; and see Ch. 125, a. 7, s. 5; and boundaries, Ch. 89. But generally a devise of lands and tenements does not pass leasehold estates. *Cro. Car. 292*, *Rose v. Bartlett*; 6 Cruise, 204, *Davis v. Gibbs*. 6 Cruise, 196.

§ 5. By the words, *lands, tenements, and hereditaments*, will pass every species of real property, also monies directed to be laid out in lands, in equity. So the words, *all my lands*, may pass a house, where no intention appears to the contrary. *Ewer v. Hayden*, cited 6 Cruise, 191. And the word *estate* will pass every kind of property, unless restrained by other words. See Ch. 128, a. 3, s. 1 to 23. 3 Bro. R. 99,
Rashley v.
Masters.—
Cro. El. 476.

§ 6. But where the word *estate* is confined to personal only, it will not be construed to extend to real property. As if one give several legacies, and then gives and devises all the rest of his estate, chattels, real and personal. And 2 Atk. 102. And in many other ways the word *estate* may be limited. The words, *all my rents*, are sufficient to pass real estate. As where A leased several houses and lands, by leases for years, rendering several rents, then devised in these words, "as concerning the disposition of all my lands and tenements, I bequeath the rents of D to my wife for life, remainder over in tail." Held, the reversions passed with the rents of the lands, that is, the land itself passed, as it appeared to be the testator's intention to pass all his lands and tenements; and an estate for a longer time than the leases enured. The word *house* will carry the garden or curtilage belonging to it, without the word *appurtenances*. And see Ch. 125, a. 7, s. 8; and Ch. 128. 1 Eq. Ca.
Abr. 211; cit-
ed 6 Cruise,
193, 194, 195.
Cro. Jam.
104, Kerry v.
Derrick.—
Cro. El. 89.

CH. 128.

Art. 1.

2 Burr. 1089.
—1 W. Bl.
256, 256,
Paul v. Paul.

§ 7. *What description, not restriction.* Dr. Paul devised to his wife his farm at Bovington, in the tenure and occupation of John Smith; devised to her several other estates in the same manner, and concluded by a general devise to her of all his freehold and copyhold lands above devised; his farm at Bovington was copyhold, demised to John Smith, with an exception of the woods and underwoods. Held, the words in the tenure and occupation of John Smith were not words of restriction, but of additional description, and that the woods &c. passed to the devisee.

6 Cruise, 205
to 218.—Cro.
Car. 292.—1
Ves. 271.—2
P. W. 459.

§ 8. The words, *lands and tenements*, do not include leasehold estates; but the word *farm* may; but fully settled, the words, *lands and tenements*, do not include leasehold estates. Cases both ways: do not according to *Rose v. Bartlett*; *Davis v. Gibbs*; *Knotsford v. Gardiner*, 3 Atk. 450; *Pistol v. Richardson*, 1 H. Bl. 26; *Addis v. Clement*, 2 P. W. 456; *Lowther v. Cavendish*, Ambl. 356; *Turner v. Hustler*, 1 Bro. R. 78; *Lane v. Lord Stanhope*, 6 D. & E. 345, 655, in this last case the others were cited: but in a later case, considered, (*Thompson v. Lawley*, 2 Bos. & P. 303, 5 Ves. jun. 476,) the rule in *Rose v. Bartlett* was confirmed as a settled rule of property. Hence under a general devise leaseholds do not pass. The cases to the contrary had in them special circumstances, &c.

CHAPTER CXXVIII.

ESTATES IN FEE.

ART. 1. *Words that give a fee simple.*

§ 1. The nature of fee simple estates have already been considered, as also the modes and ways of conveying them. Seizin and disseizin of them likewise have been examined. So the existence of fee simple estates in various forms, as in possession, remainder, and reversion, in mortgage, &c. &c. have been occasionally considered, and in the multitude of cases already examined or cited. Touching these estates, there are many in which it may be seen what words make or give a fee, or not, in devises as well as in deeds, especially in executory devises, which have already been particularly attend-

ed to. It now remains to select the best cases, from hundreds existing, to shew what words make or give a fee; and in this it is of more importance to attend to principles that ought to govern, in construing words and clauses in the various instruments by which fee estates are created, than to a detail of words, variously used and almost without end. And in such constructions there have been very considerable changes in three centuries; and hence the modern cases are much the most useful, and much the most to be relied upon. It has been stated, Ch. 125, what words are necessary to make and do make an estate in fee, in deeds, and common law conveyances, in many cases; some more will be stated in this chapter, which will however be principally in selecting expressions that in wills create fee estates. Sundry cases, 6 Cruise, 237, &c.

CH. 128.

Art. 2.

§ 2. Estates in fee are given, conveyed, devised, or created, not only by the common well known words, "*heirs and assigns*," which never fail to raise a fee, but by many other words, which either lay some charge on the devisee, that he cannot bear without being a loser, if he have not a fee, or shew the devisor meant to give or devise his whole interest or estate in the lands to the devisee, and so a fee estate if the devisor has such; and in the third place there are many other words in deeds and wills, &c. which do not lay such charges on the purchaser of the estate, or name such whole interest in it, and which however convey a fee. But where it is doubtful if the words in a will give a fee, the heir's title prevails.

ART. 2. *Words paying &c., when a fee or not.*

§ 1. As to this part of the case, there seems to be this general and well settled distinction: if when lands are devised to a man, he paying, or to pay certain sums, if he may possibly be a loser by paying, taking only a life estate, he shall have a fee; because the law intends the devise is meant to be a benefit to him in all events, then if taking only a life estate, and paying the sums, he may be a loser, it is contrary to the devisor's intentions; the devisee may die in one year, and so receive the profits of the estate but one year, and these may be but a small part of the debts he is charged to pay, and therefore if he has but a life estate he must be a great loser, contrary to the intentions of the devise to him; to prevent this, and to avoid in all events a state of things so unreasonable, and never intended, the law will give him a fee. But if, on the other hand, the sums the devisee is charged to pay are to be paid out of the rents and profits, so fast and so far only, as he receives, so that he cannot be a loser by the payments, if he have but a life estate, then the law gives him a life estate, and no more, where there are no words to create a fee,

Cowp. 234,
Morgan & al.
v. Griffiths.—
10 John. R.
148, a distinction between a charge on the person of the devisee & on the estate generally.

CH. 128.
Art. 2.

6 Co. 16.—
Cro. El. 497.
—8 D. & E.
1.—6 Cruise,
254, 256, 263.

6 D. & E. 13,
Goodright v.
Stocker.—5
D. & E. 292
—4 Maule &
S. R. 58, Ten-
ny v. Collins;
& 366,
Reeves v.
Gower —11
Mod. 208.

Cro. Jam.
527, Spicer
v. Spicer.

Cro. El. 330.
—6 Co. 16,
Collyer's
case.—2
Binn. R. 463.
—10 Johns.
R. 148.—5 D.
& E. 558.—8
D. & E. 497.
—5 Bos. & P.
343.—Cowp.
410.

Cro. El. 204.

as some words of limitation, some words expressing forever, or some words shewing the deviser means to devise his whole interest or estate in the land, paying out the rents &c. Cro. Car. 157; 2 Atk. 341. So there is no fee if the debts be charged contingently on the real estate devised, as if in case the personal estate be insufficient to pay them. Merson v. Blackmore.

§ 2. Where the testator devised, touching his temporal estate, to Baker, his house, paying yearly out of said house 15s. to A, for life. Held, Baker had a fee in this case on the word *paying*. The estate was worth £6 a year, and Lord Kenyon said, "though the general introductory words used in this will would have some effect in the construction of the subsequent devises, as was said by Lord Talbot in a case before him, they would not of themselves have carried the fee." In this case the devisee was to pay an annuity for A's life, and if the devisee had but a life estate, he might have been a great loser, a thing the testator could never intend; hence it was held, he took a fee.

§ 3. This was a devise to A for life, remainder to B, he paying £3 a year to one, and two sums in gross, and not out of the rents and profits. Held, this gave B a fee, for the reasons above.

§ 4. In this case the devise was of part of the deviser's land to his daughter, and part to his wife, for life, with the profits whereof she should bring up his daughter; and that after her death it should remain to his brother, paying to one 20s., and to others small sums, in all 45s., the land of the value of £3 a year. Held, the brother had a fee; further if the land had been devised to him to the intent that with the profits he should educate his daughter, or of the profits of the land to pay to one so much, and to another so much, that is, but an estate for life, for he is sure to have no loss. So if lands be of the value of £3 a year, and he devise that he pay for it 20s., 30s. 40s., or 50s. a year to another, it is but an estate for life, for he may pay it out of the profits, and is sure to have no loss. But in the case at bar, the court said, "after the payment he may die before satisfaction, and therefore it is a fee simple," for the law doth intend the devise was for his benefit, and not for his prejudice.

§ 5. See Wilcocks or Wellock v. Hammond, Ch. 43, a. 9; Ch. 111, a. 5, the same principle; and the court said, the amount of the rent compared with the sum to be paid in gross, was not material. 1 Rol. 834; 2 Mod. 25; 2 Cro. 591; Willes, 138; Cowp. 356; Willes, 650; Cro. El. 497, Bacon v. Hills.

§ 6. This was a devise in which the testator gave his house and furniture to A, and made A executrix, "she paying all my debts and legacies." Held, A took a fee. He also left A all the rest of his personal estate. And Lord Kenyon said, that "in cases of this kind, the question has always been, whether the charge is to be paid only out of the rents and profits of the estate, or whether it is to be paid by the devisee at all events; in the former case the devisee takes but an estate for life, but in the latter he takes a fee, otherwise he might be a loser by the devise; here the devisee is bound to pay the debts and legacies, at all events, and the charge is thrown on her in respect of the real estate, the personal estate is given to her by the next clause in the will. But this reasoning is hardly conclusive, because the devisee was not obliged, as such, to pay the debts and legacies, but by her own voluntary act in accepting the devise, and as she accepted it freely, why not take it subject to such a construction as the words plainly bear?"

CH. 123.
Art. 2.

S D. & E. 12,
Willey v.
Holmes.

§ 7. *Paying debts, &c.* When lands are devised to one for payment of debts, or for the payment of debts and legacies, or for other special purpose, then the devisee has no more interest in the lands, as to quantity or duration, than will answer the purpose; and if this be otherwise answered, he has no interest at all in them; and if in possession for a time, taking the profits, he is trustee to account for them. Where a mere trifle has no weight, 2 W. Bl. 1045.

A parol gift
of land cre-
ates only a
tenancy at
will, 2 Caines,
Ca. in E. 314.

§ 8. This was a devise of particular lands in A, in aid of the testator's personal estate, to trustees for the payment of debts, legacies, and funeral charges, and of "all the rest, residue, and remainder, of his real and personal estate to his wife, her heirs, executors, or administrators;" the personal estate proved to be sufficient for these purposes. Held, the lands devised passed to the wife under the residuary clause: also held, that if the personal estate had proved deficient in part only, the wife would have been entitled to the residue. This was in ejectment, brought by one of the testator's two heirs at law. In this case other estates were devised besides the estate to the trustees, to which, Lord Mansfield said, *rest* and *residue* referred, if no devise at all to the trustees, as the event happened; and he was clear of opinion, that the estates were not devised to the trustees; and he observed the testator said, "in case my personal estate shall not be sufficient, then I devise &c., he dies, his personal estate is more than sufficient, therefore he has devised nothing:" 2. Suppose there had been occasion to make use of this devise to the trustees to pay part of the debts, then the devise would have once taken effect, and there would have been a resulting trust

Cowp. 43, 47,
Goodtitle v.
Knot.—And
Lofft, 452.

CH. 128. for somebody, subject to such charge. In that case the heir at law could not recover, not because the legal estate was in the trustees, but because the residue was devised to the wife, and belonged not to the heirs,—but if to them then they may recover.

Art. 2.

2 Ld. Raym.
1324, Cliffe
v. Gibbons.—
2 Lev. 91.—
1 Mod. 100.

§ 9. In which case A, by will, directed all his debts and funeral expenses to be paid, as soon as conveniently could be after his death, and gave a power to his wife to sell, if need be, his lands &c. for that purpose, and then to pay his legacies, among which he gave one of £1000 to her, and the residue of his estate, after debts and legacies paid, he gave to her. Lord Cowper was clearly of opinion that a fee passed by the devise of all the rest and residue to the wife after payment, &c.

§ 10. To the same purpose are *Sprigg v. Sprigg*, 2 Vern. 394.

Cowp. 852,
Loveaces v.
Blight & ux.;
cited 6
Cruise, 238
—See Willes,
650, Jenkins
v. Jenkins.—
8 East, 141.
—2 Ves. 48,
Baillies v. Gale.
—2 Lev. 91,
Wilson v.
Robinson.—
Secus effects.
2 Maule &
Sel. R. 448,
Doe v. Dring.
—6 Cruise,
197.

This was ejectment. John Mudge, seized in fee of the premises, devised, as touching his wordly estate: 1. £5 a year to his wife out of his estate called Gloze, and the west side of his dwelling house, and as much woodcroft as she needed, by his executors: 2. To his oldest son Thomas £5, to be paid in a year, &c.: 3. To his granddaughter Elizabeth £5, to be paid in a year, &c.: 3. To his two sons, John and Robert, made his executors, “all and singular my lands and messuages, by them freely to be possessed and enjoyed alike. Held, that John and Robert took a fee, and as tenants in common. Here the words were, *lands* and *messuages*, to John and Robert, and no words of limitation. Lord Mansfield observed, if a man says, “I give all my estate,” a fee passes, or so even if “all my estate in A,” for the words include his whole interest in that particular estate; the word, “*estate*,” includes not only the land or property a man has, but also his interest he has in it; so the words, “*all my wordly substance*,” so “all his *real effects*” mean *all his interest*;—made an observation as to the introductory words similar to that in *Goodright v. Stocker*, and added, “if a man devise lands to another, paying thereout £100, or any other gross sum, though he add no words of limitation, yet the devisee shall have a fee; because unless he were to take a fee, he cannot be sure of paying the £100. So if an estate be given to A, to be sold for payment of debts and legacies, the purpose to be answered makes it a fee, without words of limitation.” “In short wherever any thing is directed to be done, which, strictly speaking, an estate for life only may not be sufficient to answer, the court will imply a fee.” Then noticed the life annuity to the wife, not to be satisfied by a life estate only in the two sons, and her wood “to be provided in

all events," as their profits in a life estate might end before her annuity; then noticed the words, "*freely to be possessed by them alike*," as implying "free from all limitations;" and that *alike* is the same as *equally*, &c. and makes a tenancy in common. Word *reversion* passes a fee. 6 Cruise, 252. CH. 128. Art. 2.

§ 11. A devised all his lands to his sister in fee, "except out of this general grant my manor of R, which I do appoint to pay my debts," and made two executors; one died: and held, the other might sell the manor to pay the debts. Dyer, 371 b.

A devised several legacies, especially four coats to four poor boys, of the parish of J. S., forever, and then all his lands, tenements, and hereditaments, whatsoever; and all his personal estate to his wife, and her assigns, and made her executrix, and left £1000 personal estate. Held, she had a fee by reason of the perpetual charges. The words, *all I am worth*, give a fee. Hurtop v. Brooman. Salk. 685, Smith v. Tyndal; cited 6 Cruise, 251. —2 Mod. 25.

§ 12. In this case the devisee took a fee in an estate worth £16 a year, because he had to pay to his two sisters £5 a year for their lives; and the court recognised the above rules, and said there must be a fee if a possibility of a loss, without one, though not at all probable. So in this case, 5 D. & E. 292, the same principle was adopted, and a fee allowed. Interest gives a fee. Read v. Hatton. Andrew v. Southouse.

§ 13. So such a devise as in Smith v. Tyndal, paying thereout his legacies and funeral charges, gives a fee. 2 Bos. & P. 252; 5 Bos. & P. 349; 5 East, 93; Moseley, 240; 3 Maule & Sel. 518, 525; 8 D. & E. 1. 3 D. & E. 356, Doe v. Richards

§ 14. In this case the testator, among many devises, did devise to Sarah Boreham certain lands, she paying thereout 40s. a year to her sister Elizabeth. Held, Sarah had a fee devised to her by this clause; and the above distinctions were admitted. See also Doe v. Woodhouse, next article; also Wellington v. Wellington. 3 Barr. 1533, Baddeley v. Lippingwell. —2 W. Bl. 938.

§ 15. This was *formedon* in remainder. And held, a devise of wild or uncultivated land, covered with wood, carries a fee without words of inheritance: 2. It may be shewn it was thus wild, by parol evidence, and *dehors* the will. 1. A devise is ever intended for the benefit of the devisee, but a life estate in wild lands is of no value: 2. Averments are admitted to explain; as where there are two Johns, two black-acres: so as to facts known to the testator, "and which may be reasonably presumed to have influenced him in the disposition of his property." 10 Mass. R. 303, Sargent & al. v. Towne.—6 Cruise, 259, 263.

§ 16. The testator bequeathed to his wife £200 a year, for life, in addition to her jointure, secured by a term out of his real estate, "his debts being previously paid; and to his youngest children £6000 each, to be paid at twenty-one res- 7 East, 97, Trent v. Hanning.—4 Bos. & P. 116.—10 Ves. jr. 496.

CH. 128. pectively ; then the testator appointed three trustees of inheritance for the execution thereof. Held, by three judges against one, the trustees took a fee in the testator's lands. Whatever else I have not disposed of, passes a fee. 6 Cruise, 251 ; 2 Salk. 235.

Art. 3.

ART. 3. *Words, estate, interest, when a fee.*

§ 1. There are certain words often used in wills, not merely descriptive of the land, but of all the estate or interest the testator has in the lands, and when he uses these words, or any of them, they give a fee. See preceding articles *Love- acres v. Blight*, and many cases that have been occasionally cited in the preceding chapters ; a few cases are here added.

1 Wils. 333,
Grayson v.
Atkinson.—6
Cruise, 250.
—And like
cases, Mur-
ray v. Wise,
Farmer v.
Wise ; Redart
v Paine,
3 Atk. 486.—
2 Vern. 564.

§ 2. In this case the testator said, in his will, "as to all my temporal estate, I dispose thereof as follows" &c., then gave several legacies to A and directed him to sell all or any part of his real and personal estate for the payment of his debts and legacies ; and added, "as to all the rest of my goods and chattels, real and personal, moveable and immoveable, as houses, garden, tenements, my share in the copperas works &c., I give to said A," not using the word *estate*, or any words of limitation whatever. Held, A had a fee. Lord Hardwicke said, by the word, *temporal estate* &c., the testator meant to dispose of all his estate, as to quantity and quality : 2. The inheritance is charged with his debts and legacies : 3. The word *rest* related to his temporal estate he was disposing of.

Cowp. 299,
Hogan v.
Jackson.—
See 11 Ves.
jr. 205.—2
Bos. & P. 214,
effects alone
mean goods.
—3 East, 516.
—1 Wash. 45.

§ 3. In this case, after devises for life &c., the testator devised to his mother, all the remainder and residue of all his effects, both real and personal, which he should die possessed of. Held, the mother by this *residuary* clause, took a fee in all the testator's fee simple estates, and the whole of his interest in his real property. Lord Mansfield thought the word *effects* equivalent to *wordly substance or property*, then it conveys a fee ; and "*real and personal effects* mean all a man's property ;" and "the words, *remainder of real effects*, include the reversion of every thing not disposed of." So slaves and other property.

Dougl. 763.—
6 Cruise, 197
to 200.

Lord Mansfield said, the words, "*all my estate*," or "*all my interest*," will pass a fee ; but not "all my lands lying in such a place."

3 Com. D.
395.—Mod.
873.

§ 4. So if one devise all his lands of inheritance to another, a fee passes. "All my estate," passes a fee. Salk. 236, *Bridgwater v. Bolton*.

1 D. & E. 411,
414, *Holdfast*
v. Martin ; ci-
ted 6 Cruise,
249, 320.—2
P. W. 335.

§ 5. The devise was of a farm to Mrs. Martin, "my estate at" B, and the rest of his effects, furniture, estates real and personal, to C. The court held, that A took the estate at B in fee ; the word, *estate*, of itself carries a fee ; here it was

urged, the word, *estate*, was in this case a mere word of locality, a mere description of the thing only, and not of the interest. The word, *estate*, is *genus generalissimum*. 6 Cruise, 250. CH. 128. Art. 3.

§ 6. Held, that if the testator speak of disposing of all his temporal estate, in the introductory part of his will, and then devise his houses at A to one, and his houses at B to another, to come into possession on the death of his executors; these words conveyed no fee, but the court said the word *hereditaments* may, in a will, be a fee. "So if I make one my heir. Or the word *reversion* may give a fee." But words that give a fee may be restricted; "as if I give all my estate in such a place to A B," or "I give all my lands, tenements, houses, farms;" these words of themselves give no fee, and are but a description of the thing *per se*. But if I give my houses to A to pay my debts," a fee passes. So if I devise lands to sell them, a fee passes, or to pay debts which takes money out of the devisee's pocket, is a fee 3 Wils. 414, Frogmorton v. Wright.— 6 Cruise, 244. 2 P. W. 335, 523, Barry v. Edgeworth.— 2 Vern. 564.

§ 7. W. Green devised his house and land in *Clay* to his son William for life, "and then to remain to Thomas Green his son, except said William Green do purchase another house with so much land, and so good in value as the said house and land in *Clay* for the said Thomas his son, and then the said William shall sell the said house and lands in *Clay* as his own;" held, Thomas had a fee on all these words, not on the words *house* and *lands* alone, for if he did not have them William was to buy another estate for him and sell this. And it must be meant to buy and sell in fee, and a clear devise like this shall not be altered by after doubtful words. Hob. 65, Green v. Armstead, cited 6 Cruise, 238.

§ 8. One, as to his temporal estate, devised to his nephew J. (his heir at law) £50, and, after other legacies, "all the rest and residue of my estate whatsoever, I give to my wife M. and made her executrix." And the court decided that an estate in fee simple passed to M. 2 Vern. 269; 1 Lev. 130; 12 Mod. 594. 3 P. W. 295. —3 Com. D. 396, Tanner v. Morse.— 1 Bos. & P. 217.

§ 9. And now it is held, that the word *estates* is equivalent to *estate* and will pass a fee, unless coupled with other words which shew a contrary inclination. 2 D. & E. 659, Tilly v. Simpson. 2 D. & E. 666, Fletcher v. Smiton.

§ 10. If there be a devise of the residue of real and personal estate, in trust for testator's younger son till he attain 21, and then the trust to cease, the younger son takes a fee. Amb. 387. 1 Salk. 734.

§ 11. The testator in his will spoke of disposing of all his temporal estate, then made provision for his heir at law, and then "devised all the rest and residue of his goods and chattels, rights, credits, personal and testamentary estate whatsoever, to B for his own use and disposal." Held, B took an 2 H. Bl. 444, Smith v. Coffin, cited 6 Cruise, 249.

CH. 128. estate in fee in the lands of the testator ; and Buller J. said,
 Art. 3. where it is apparent in the introduction of a will the testator

means to dispose of his whole estate, the devising words are to be taken in the largest sense, in order to agree with the introduction. This did not profess to dispose of the testator's estate in *Denn v. Gaskin*, or *Shaw v. Russell* ; and the word *testamentary* applies to real as well as personal estate. Even the word *legacy* will pass a real estate, that is, where before the testator had devised personal and real estate, and then used the word *legacy*, the court held, it might well be referred to both, and mean lands as well as goods.

1 Burr. 268,
Hope v. Taylor.

5 D. & E.
 716, 719,
Hardacre v. Nash.

Com. R. 164,
Hopewell v. Ackland.

§ 12. And in this case, *Hardacre v. Nash*, the court held, the word "legacy" may be applied to real estate, if the contents of the will shew that such was the testator's intention.

§ 13. John Ackland devised his manor to his niece, and if she died before 21, then to his brother Richard in fee ; also devised to him "all my lands, tenements, and hereditaments, whatever ;" "also, I give my brother Richard Ackland, all my goods, chattels, monies, debts, and whatever else I have in the world not before by me disposed of," he paying all my debts and legacies,—and made him executor, and B overseer thereof ; held, Richard Ackland took a fee under these words, *whatsoever else he has in the world*, especially, paying debts and legacies.

Com. R. 337,
Scott v. Alberry.—
 Amb. 180.

§ 14. The court in this case decided that a devise of all his estate whatsoever, comprehends all that a man has, real or personal ; and when he had surrendered to the uses declared in his will, the will shall have the same construction, as if it had passed the land itself.

3 Com. D.
 396.—2 Vent.
 285.

§ 15. One devised to A for life, and afterwards "all my lands, tenements, and hereditaments not before disposed of, to B : held, this gave the reversion of the lands before devised, to B in fee.

2 Burr. 880,
Hunt v. Winchelsea.
 1 W. Bl. 187.

§ 16. In this case one devised to his wife all his money, plate, &c. "and all my goods, chattels, and personal estate, real or personal, whatsoever and wheresoever, that shall be in my possession, or I shall be any ways entitled to at the time of my decease ;" then devised to her, in fee, such part of his real estate as he had power to dispose of ; held, she took a fee. How an appointee in a will under a power must survive the appointor.

4 Cruise,
 237.
 4 D. & E. 89,
 93, *Doe v. Woodhouse & al.*

§ 17. Thomas Keys, seized in fee, devised his debts and funeral expenses be paid out of his whole estate by his executor ; then devised real and personal estate to his wife for life, and directed a part of the personal to be sold after her death by his executors, and divided between C, D, E, F, and G : gave two annuities to H and J to be paid by his executor, out

of his whole estate, to begin after his wife's death : and he then devised "the remainder of the profits, after his wife's death, and after the yearly payment to the annuitants out of his whole estate, to B, C, and D equally, share and share alike : " held, that the executor took a fee ; as the annuities were to be a charge on the real estate by the executor, he must take a fee to answer the charges made on him.

CH. 128.
Art. 3.

§ 18. If a man give a particular limited estate to A in one part of his will, and then gives him all the residue of his real estate, (and there are no restrictive words), the fee passes.

2 Atk. 57.—
3 Atk. 486,
Ridout v.
Paine.

§ 19. A first directed his debts to be paid, and added, "in default of issue of my body, I give lands to B, in trust to pay annuities till my debts are paid, and after all my debts &c. (except the annuities) are satisfied, I give the lands to C," &c. A died a bachelor : held, B took a fee, determinable when the purpose of paying debts is performed. 2 Vesey, 48.

4 Burr. 2165,
Wellington v.
Wellington.

§ 20. The testator devised a farm to A for life, remainder to her daughter B, she paying to C and D her sisters £500 each, and if either died, to the survivor, and if B died the farm to be divided among the survivors, and if all three died before A, her heirs to have it in fee. Held, C and D were entitled to the farm in fee, and in moieties, if they survived their mother A, and their sister B dying before she paid their legacies ; so if the latter part of the devise, "in case all three die before A, then to A's heirs," &c. had not been added. A devise to A, he paying debts or a legacy, will carry the fee.

Willes, 138,
Moone v.
Heaseman.—
1 Burr. 234.

§ 21. In this case De Grey C. J. said, "the debt. must take a fee by implication, not indeed a necessary implication, strictly and mathematically speaking, but so far necessary, as it clearly arises from the reasonable construction of the will."

2 W. Bl.
1042, Good-
right v. Allen,
cited 6
Cruise, 260.

§ 22. Margaret Robinson having entered into articles to purchase certain premises, devised them to Ann Middleton, her heirs, &c. in trust to pay the rents and profits to the three daughters of the devisor (one being covert) and the survivor of them for their lives, share and share alike ; and after their decease, in trust for all and every of their children living at the death of the survivor of them, as tenants in common ; but if all said three daughters died without leaving any issue, then after the survivor's death, in trust for her grandson in fee, who was her heir at law ; residue of her estate to her three daughters : the estates were conveyed to the use of the will, and on a bill filed &c. held : 1. The three daughters took no legal estates, but the releasees took an estate for their lives : 2. Such of their children as were living at the death of the survivor of them, took estates in fee, as tenants in common. Urged the children took but estates for life, no words

9 East, 1, 12,
Robinson v.
Grey, many
cases cited.
2 Wash. 34.

CH. 128. *heirs, &c.* or even *hereditament* being used as to them; but answered and held the children had a fee, as the heir at law was not to take while issue of the daughters lived, and only if no issue was living at the death of the survivor daughter, and if then issue, he was not to take at all. The children also could not take estates in tail, as their mothers had no legal estates; but were only *cestui que trusts* for life, by the words of the will, and in conformity to the condition of the married one.

10 East, 460,
468, Toovey
& al. v. Bas-
sett, many
cases cited.

§ 23. *Fee by reason of a devise over, the first devisee dying under age.* As where the testatrix devised to her daughter Elizabeth Michael for life; remainder to her children and their heirs forever; but if said Elizabeth died without leaving any issue of her body, then to certain other grandchildren, by other daughters, equally as tenants in common; but if any of her grandchildren died under age and without leaving any issue, the share of the one so dying to be for the benefit of the survivors of the respective family, &c. Held, the grandchildren took a fee in their respective shares, because of the devise over, on their dying under age, with an executory devise over, if any of them died under 21, and without leaving issue at the times of their respective deaths. So the limitation over was not too remote. Dying without issue here meant at "the time of the death of the preceding taker." So the certificate was, the great grandchildren of the testatrix took estates in fee as tenants in common in the freehold premises, and an absolute interest as tenants in common in the leasehold premises, with executory devises over, "if any of them died under 21 and without leaving lawful issue at the time of their respective deaths."

Willes, 612,
Davies v.
Hamlin.

§ 24. A had one child (a daughter) B, and devised lands to a child with which his wife was *ensient* if a male, but if a female to be divided between her and B, and if both died without issue, then to C, in fee; the child was born and a male; he took a fee: B died without issue living this child, and in this event the will provided that he "shall wholly enjoy said land." If not a fee by the devise, he was the testator's heir at law, &c. The devise over was only if his wife had a female child.

5 Burr. 2638,
Roe v. Har-
vey.—Cro.
El. 674.

§ 25. A devise of all the rest of the testator's estate whatsoever and wheresoever, to his wife, her heirs, executors, and administrators, is a devise in fee. 6 Cruise, 188 to 191, defective descriptions.

4 East, 496,
Goodtitle v.
Maddern.—
5 East, 37.

§ 26. Devise of "all the rest I have in the world, both houses, lands, goods and chattels, &c. to my wife, my executrix, so that she shall sell my stock in trade, and household goods, and if these will not pay the debts, she shall sell next

the house, in fee, in Penzance, &c. ; so that my executrix shall pay, in good time, lawful debts," &c. She had a fee in the house at Penzance, as executrix ; as she was personally charged to pay the debts in respect of the real as well as personal estate devised. The postponement of the sale of the real was only recommendatory to her : 2. The distinction is in respect to giving a fee, on this, whether the debts &c. are merely a charge on the estate devised, or a charge on the devisee himself in respect of such estate in his hands.

Doe v. Snelling, 5 East, 87. Same distinction of a personal charge, &c.

§ 27. An estate is devised to trustees in fee, in trust for A ; he has a fee, though no words of limitation are annexed to his estate, for they hold in fee for him. *Peat v. Powell*, Ambler 387 ; 6 Cruise, 242, 243.

§ 28. The word *estate*, which carries a fee if not restrained, is not in a devise of "all my estate, lands, &c. known and called by the name of *coal-yard*, in the parish of Saint Giles, London." And *Bos. & P.* 335 ; 5 East, 85 ; 8 Vesey jun. 617, *Sadler v. Turner*.

§ 29. A fee by reference. As if "I devise to my eldest son and his heirs black-acre, for his part : *Item*, I devise to my 2d son, white-acre for his part." He has a fee, because the words refer to the oldest son's part.

§ 30. In Connecticut, in a devise of real estate, the words, *I give such estate to A, or A shall have such estate, or such estate shall be divided between A and B*, are sufficient alone to give a fee simple.

ART. 4. *Other words that give a fee.*

§ 1. This was a devise to Agnes Pearson, heir at law, "for and during her life, and after her death to her lawful issue, and if she have no issue, she shall have power to dispose thereof at her will and pleasure." The court held, Agnes took a fee simple by the will, as the contingent remainder to the issue never vested. Agnes had no issue.

§ 2. Wherever the estate of *cestui que trust* is in fee, the trustees must also, necessarily have a fee by words or by implication. A fee passes without the word, *heirs*, when the trust of land can be satisfied no other way.

A devise to trustees and the survivor of them without the word, *heirs*, in trust for others in tail or in fee—trustees have a fee.

§ 3. Devise to A and his heirs, and if he die before the age of twenty-four years, without heirs of his body, remainder over ; A lived to be more than twenty-four years of age ; held, he had a fee : here a fee was devised to him, and was never out of him. See *Pells v. Brown*, *Doe v. Perry*, former

CH. 128.
Art. 4.

1 Wash. 96,
cited 6
Cruise, 257.

8 D. & E.
597, Chal-
lenger v.
Sheppard, &
al.

7 East, 259,
Doe v.
Wright.

1 Roll. R.
369, cited 6
Cruise, 306.

4 Day's Ca.
368.

2 Wils. 6, 7,
Goodtitle v.
Otway.—6
Cruise, 239.

10 Mod. 523.
—2 Atk. 71.
—Gilb. L.
Uses, 75.

Stra. 798,
Shaw v.
Wright.—

5 Bac. Abr.
375.

CH. 128. chapters. All one's right, title, and interest, passes a fee. 6
Art. 4. Cruise, 240.

§ 4. This was a devise to A for ninety-nine years, and she to have the inheritance if the law allow it,—is a fee. But these words in a deed would not convey a fee. At common law there could be no fee on a fee, but otherwise by executory devise.

Hob. 2, Widlake v. Harding.—
 2 Fearn, 86.

2 Salk. 620, 621, Idle v. Coke.
 § 5. Devise to A for life, and after that to B, his son, and to his son's wife for their lives, and their heirs and assigns, and for default of such issue to A and his heirs. This is a fee in B and his wife. 4 Cruise, 446.

3 Salk 126, 127, 128.
 § 6. So a devise to A for life, remainder to his heir, is a fee simple, but if added to the heirs of such heir, A has but an estate for life. So a devise to A of lands and his assigns forever, is a fee, but not so if in a deed; but, *I give all to my mother*, does not disinherit the heir at law.

Cro. Car.
 129.—1 Roll.
 834.

Willes, 164, Preston v. Funnel; and 352, Ginger v. White, 360.—8 D. & E. 9.—1 Hen. & M. 559, Eldridge v. Fisher.

§ 7. It is a general rule, that any words which shew an intent in the devisor that the devisee shall have a greater estate than for life, and do not limit an estate tail, make a fee, though the word, *heirs*, be not used; for the intent governs, and whenever the estate is greater than for life and not in tail, it must be in fee. As if one devise land to A in *perpetuum* or forever, he has a fee. So to B to have to himself and his; so to B and his assigns forever; so to B and his heir.

§ 8. F. Eagle, the testator, devised thus, "to my brother Thomas for life, then to the nearest of my relations; so to B, the son of Thomas, and his heirs forever; and after their deceases to the nearest of kindred to me, first male and then female; the house &c. to descend to the name of Eagle, to be kept up as long as the world shall endure, and never to be sold." Held, B, the son of Thomas, took a fee. But a devise to A and his heirs, and if he die without heirs, then to his son or brother, A has but an estate tail.

1 Rol. 835.—
 Mod. 111.

§ 9. So a devise to A and his successors gives a fee, or to give to his children, or to which of them he pleases. Salk. 240; 2 Lev. 104; 2 Wils. 6.

Dyer, 357.

§ 10. One devises to A in fee simple, and after his death to B for life; A has the fee after the death of B.

2 W. Bl. 938, 940, Stiles v. Walford.

§ 11. Sheward seized in fee, devised to William, his youngest son, all his estate at Barnsley bought of H. S. in tail, and in default of his issue to the testator's four granddaughters equally, and if William left a widow, she to have an annuity of £10 as a rent charged on said estate. But if William survived his wife, he to have the estate to him and his heirs forever. Held, the four granddaughters had a fee; William died before his wife; the devise to them was of his land, lands, estate, and premises,—was a reversion on an estate tail;

if William survived his wife, he was to have the fee, and if she survived him she had an annuity out of the estate; these matters the court noticed, and concluded the testator in any event meant to dispose of all his estate and interest in said estate in Barnsley. A devise to A for life, and to her heirs and their assigns forever, vests a fee simple in A. CH. 128.
Art. 5.

§ 12. *As to locality.* This was a devise to A, her heirs and assigns of all the testator's lands in or at B, and to her of all his lands at C; held, she took a fee in lands at B, but only a life estate in those at C, though he in his will spoke of disposing of all his worldly estate. Lord Mansfield said, a devise of "all my estate," or "all my interest," will give a fee; but a devise of "all my lands lying in such a place" is not sufficient. Such words are merely descriptive of place, and give only an estate for life. Devise to A and his heirs, and if he die before the age of twenty-four years, without heirs of his body, remainder over; A lived to be more than twenty-four years old. Held, he had a fee simple estate and no fee tail.

1 Day's Ca.
in E. 299.
Dougl. 759,
Right v. Side-
botham, and
Salk. 236;
cited 6
Cruise, 310,
311.

6 Bac. Abr.
375.

8 East, 141,
Doe v. Clay-
ton & al.
See 7 East,
259.—7 Ves.
jr. 541.—
3 Cranch, 97.
—1 Wash. 96.

§ 13. *Special intent to exclude a person gives a fee &c.* Thomas Wright seized in fee and having one daughter, A married to N. B. and two grandsons, Wright Thomas Bates and Mathew Bates, devised, "as for my worldly and temporal estates &c., I give to N. B. 1s. and devised he shall not come upon my premises or hereditaments on any account whatever; then gave a legacy to said M. Bates, and £20 a year to his daughter out of the profits of his estate or lands at Eaton;" then devised to said W. T. B. "all his messuages and dwelling house situate at Eaton aforesaid, with all hereditaments &c. thereunto belonging &c., and that W. T. B. when twenty-one shall enter upon and enjoy said above mentioned estates, situate at Eaton aforesaid, but that if he should leave his profession, all his right and title to the estate devised shall devolve and descend to his brother, M. B. Held, to effectuate the devisor's intention to exclude at all events his son-in-law N. B. from coming upon the premises &c. (which possibly he might as tenant by the curtesy,) W. T. B. took a fee;—also the words, *as to my worldly estate.*

ART. 5. *American cases.* § 1. This was a writ of entry *sur disseizin*, in which Josiah Grover demanded an undivided fourth part of the estate (in several parcels) whereof Richard Dolliver died seized; under his will both parties claimed, demandant in fee, and the tenant in tail. Said Dolliver, May 22, 1744, seized in fee made his will, proved February 9, 1746, and devised as follows. He said it was his will to dispose of his estate: and 1. Directed his debts and funeral charges to be paid out of his personal estate by his executrix:

Grover v.
Pew & ux.
Mass. S. J.
Court, Essex,
1802 & 1806.

CH. 128. 2. Bequeathed all the rest of it to his wife Agnes (the executrix) for her support, "and what of it is left after her decease to be equally divided among my three daughters," (all the children and heirs he had) "as my other estate is to be." 3. Devised to his wife, his house, barn, and as much more as made half of his real estate for her life, and after her decease as below: 4. He devised "the other half of my real estate to my three daughters, equally, viz. Mary, wife of William Davis, Hannah, wife of Josiah Grover, and Rebecca, wife of Joseph Coward: and also 5. "The part that I give to my wife during her life, I give after her decease (except the homestead) to my above named three daughters equally, during their lives, and after their decease to the children of their own body, lawfully begotten, and if any of them happen to die without children as aforesaid, then their or her share to be to my surviving daughters or their children:" 6. He devised his homestead after his wife's death equally to his two grandsons, Dolliver Davis (eldest son of said Mary,) and Richard Grover (eldest son of said Hannah) forever.

Testator died February 1, 1746, leaving said Agnes his widow, who died in 1756, and his said three daughters, his sole heirs, and their husbands living. When the testator made his will and when he died, said Mary had nine children, and said Hannah six children; Mrs. Coward never had any children. Said Dolliver Davis, heir in tail, if an estate entailed, died in 1747, leaving Sarah Elwell his daughter and heir; said Richard, heir in tail, if &c. died in 1762, leaving two daughters his heirs, viz. Elizabeth Dole, and Abigail the wife of Pero, the tenant; they claimed in tail in her right. When the testator died, February 1, 1746, said three daughters entered into said half devised to them immediately, as tenants in fee simple, and occupied in severalty under a parol partition, and when their mother died in 1756, they entered on two thirds of the half given her for her life (all except the homestead agreed to be one sixth of the whole estate) and occupied in the same manner, so continued to occupy till said Hannah died, in 1782, leaving—children and issue of children deceased; said Rebecca, died in 1783, said Mary died in 1784, leaving children &c. Husbands all died before their wives: on said Hannah's death, her son Joseph entered as one of her heirs, and continued in possession as tenant in common till said Pew entered on him in 1786, claiming an estate in tail in his wife's right. Said Joseph sued and died pending his action, leaving his son Josiah and other children; said Josiah, his son, sued the second action and declared on his father's seizin, January 1, 1786, and Pew's disseizin, July 1, 1786, and the descent of the right to said Josiah the demandant, and judgment for him for nine seventieths.

The main question was, if said three daughters of the testator took under his will as tenants in tail, or only estates for their lives, and their children as purchasers in fee &c., as below.

CH. 128.
Art. 5.

Decided after several arguments, mostly in the first action, the daughters had a fee simple in said moiety devised to them immediately,—were but tenants for life, and their children purchasers in fee, in the two-fifths devised to the wife for her life, and no estates in tail. This case it may be observed, rested on English authorities. A fee simple in the moiety, on *Denn v. Gaskin*, Cowp. 657; *Loveacres v. Blight*, Cowp. 352; *Salk. 236*, *Bridgewater v. Bolton*; 2 Com. D. 580, *Tuffnell v. Page*. And if not a fee, they were the testator's sole heirs, and took this part by descent in the same proportions, and as parceners; if by devise as tenants in common. *Denn v. Gaskin*. The difference varied not the proportions, they had in the part devised to Agnes for life, but estates for their lives, remainder to their children by purchase in fee. Decided in part on the construction of the will itself, and in part on the English authorities. On the will—on the introductory words, *all his estate &c.*, he divided personal estate among his daughters as he did said real estate,—was expressly during their lives, and after decease to their children who were all born when the will was made. The will regarded all the fifteen children alike.

6 D. & E. 30,
Doe v. Burn-
sall.—1 Wils.
333, *Grayson*
v. Atkinson.
—Dougl. 763.

The word, *children*, is a word of purchase in its natural meaning. Authorities for the demandant, *Wild's case*, 6 Co. 17; 4 D. & E. 82, *Doe v. Applin*; Dougl. 264, *Goodright v. Dunham, &c.*; 1 D. & E. 597, *Doe v. Lyde*; 3 D. & E. 434, *Doe v. Perryn*; 3 D. & E. 480, *Ives v. Legg*; 3 Atk. 126; 1 Vent. 228; 4 D. & E. 294, *Doe v. Collins*; *Salk. 224*, *Loddington v. Kime*; *Salk. 236*, *Popham v. Banfield*; 6 D. & E. 30; 2 Com. D. 571, 606, 726; *Gilb. Cases*, 20, *Backhouse v. Wells*; 1 Co. 66, *Archer's case*; 2 H. Bl. 399, *Doe v. Clark*; 1 W. Bl. 265, *Long v. Laming*; *Cro. El. 313*, *Clerk v. Day*; Cowp. 819, *Cook v. Booth*; 2 Atk. 220, *Buffer v. Bradford*, 1 Vent. 226, *Goodwyn v. Goodwyn*. Cited by Dane for the demandant.

For the tenant, 1 East, 229, *Doe v. Cooper*; 2 W. Bl. 1083, *Wharton v. Gresham & al.*; 2 Bac. Abr. 59, *King v. Melling*, and Vent. 214; *Anderson*, No. 36; *Moore*, 397; 3 D. & E. 493, *Doe v. Perryn*; Dougl. 320, *Davie v. Stevens & al.*; Dougl. 431, *Hodge v. Middleton*; 2 Wils. 322, *Roe v. Green*; 1 Vent. 231; 3 *Salk. 296*; 1 Burr. 38, *Robinson v. Robinson*; 9 Co. 127, *Sonday's case*; 1 East, 264, *Goodtitle v. Herring*; 2 East, 37, *Watson v. Foxon*; 3 East, 533, *Doe v. Ironmonger*. Cited by Parsons for the tenants.

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Art. 5.

Newkirk v.
Newkirk.2 Mass. R.
56, Richard-
son & ux. in
E. v. Noyes
& al.This case is
very much
like Grover
v. Pew.

A devise of all my right in certain lands carries a fee. 2 Cain. 345. So all my interest. And 8 D. & E. 502; 2 Binney, 18, 464; 4 Dallas, 226, Bushby v. Bushby; 5 East, 85; 8 East, 141; 8 Ves. jun. 617, as to the introductory words as to my estate &c. By Parsons.

§ 2. This was a devise in these words, "I give to my three sons, John Noyes, James Noyes, and William Noyes, all my other lands with the appurtenances in Sudbury, except the improvement of one third reserved to my wife as above mentioned; also my will is, that if either or any of my last three named sons, John, James, or William, should die without children, the survivor or survivors to hold the interest or share of each, or any of them dying without children as aforesaid. Also, my will is, that my husbandry tools and negroes shall be equally divided amongst and between my three sons, John, James, and William last mentioned, to be possessed by the survivor or survivors, as above mentioned." 1 Phil. Evid. 431.

The court decided, that these words passed a fee simple determinable on the contingency of their dying without issue, and on that contingency vesting in the survivor or survivors by way of executory devise.

There was a like preamble in this will expressing that the testator intended to dispose of all his estate by his will. There were several other devises and bequests in this will, and there was a residuary clause of all his estate real and personal, equally to his children,—appointed his oldest son, Jonas Noyes, and E. Smith his executors. The will was dated Oct. 24, 1765.

The testator devised to his eldest son, Jonas Noyes, "certain land, without using any words of limitation." But Sedgwick J. who delivered the opinion of the court, thought from a view of the whole will he took a fee, and thence inferred John, James, and William, also took estate in fee. The wife had the improvement during her widowhood, and it was observed the land itself was given to the three sons, and that when the testator "devised the thing itself," he "intended to give his whole estate in it;" if children, the estate was by implication to go to them, if not, to the survivors or survivor the share and interest was to go; so an estate of inheritance, not an estate tail; he coupled real and personal property in the same form of disposition, and the personal property must have reference to the testator's death to go over to the survivors &c., and not to an indefinite failure of issue one or two centuries hence &c. See Ray & al. v. Justin; Ch. 114, a. 31; and Ide v. Ide, Ch. 114, a. 31.

8 Mass. R.
458, Bates &
ux. v. Webb
& al.

§ 3. In this case one devised his estate to his wife to be for her own comfort and the support of my children who are minors, during the time she remains my widow, without any

disturbance &c. from any of my children, and in case she alters her condition by marriage, then to be divided as the law directs, each child to receive an equal portion." Held, the children took a vested remainder in fee simple. The testator in the preamble of his will spoke of all his wordly estate, real, personal, and mixed, and added, I devise and bequeath the same to my wife Sarah &c., as above. The word, *estate*, is kept in view as the subject of the devise throughout.

CH. 128.
Art. 5.

§ 4. Testator gave all his property, real and personal to A, B, C, &c. his children, to be divided &c.; then added "but if any one or more of my above named children shall die before they arrive at full age or without lawful issue," then over. Devise over good as an executory devise: cites sundry cases to the point in several States; and *Purefoy v. Rogers*, 2 Saund. 388: 2. Held, the share of one of the six children dying without issue after the death of four of them who left issue, went to the only surviving child; though the will was, if any of them died &c. his, her, or their part should devolve &c. equally among the surviving children, and to their heirs and assigns forever. See *Grover v. Pew & al.*, Ch. 128, a. 5. Four in this case died, leaving issue; the fifth arrived at full age and conveyed his share, and died intestate and without issue; held, the word *or* was to be construed *and*; hence the devise over did not take effect, and the fifth's sale good. In this last case this point contested for two centuries and more was well considered, and all the authorities examined in order by Kent C. J. The first was, *Soulle v. Gerrard*, 27 & 28 Eliz., Moore, 422, Cro. El. 525; the devise was to the son and his heirs, but if he died without issue or within the age of twenty-one years, then to the other sons. The devisee died under age, leaving issue; held, the issue took the land, and not the remainder-man, and the word *or* was construed *and*. The same, *Price v. Hunt*, Pollexfen, 645, *or* construed *and*; *Woodward v. Grasbrook*, 2 Vern. 388, *contra*, *or* retained; but *Barker v. Suretees*, 2 Stra. 1175, *or* construed *and*; same, *Walsh v. Paterson*, 3 Atk. 193; *Framingham v. Brand*, 1 Wils. 140; *Wright v. Kemp*, 3 D. & E. 470; and *Fairfield v. Morgan*, 5 Bos. & P. 38. A. D. 105, in the House of Lords. In all these cases *or* construed *and*; also in many other cases of the sort found in the books, the only construction that makes sense of these numerous cases. See the words *and* and *or* in the Index.

3 Johns. R. 292, Jackson v. Blanshan. —10 East, 467.—2 Bin. 682.—See Ch 129, a. 3, s. 5.—Ch. 114, a. 31, s. 20.

But contra, 6 Johns. R. 64, Jackson v. Blanshan.

36 Car. 2.—Ch. 130, a. 2, s. 36.—Ch. 125, a. 1, s. 13.

§ 5. The testator devised "two thirds of his real and personal estate to his wife to be disposed of at her pleasure, after the death of his grandson T." Held, she took a fee which vested in her after the death of T. 2 Johns. R. 391; cited 1 Leon. 256; Moore, 57; 2 Atk. 102.

Jackson v. Coleman.

CH. 128.

Art. 5.

11 Mass. R.
528, Cook &
al. v. Holmes
& al.

§ 6. Devise to one without words of inheritance may convey an estate in fee, being construed with the whole will and the testator's intent thence inferred. The particular devise was "to his grandson Gregory C., only child of his son Daniel C., a certain piece of land in Watertown, containing" &c. a devise in itself clearly for life only, yet construed a fee simple, taking into view the other parts of the will, especially the equality the testator evidently intended among his children and grandchildren.

12 Mass. R.
428, Claflin
v. Perry.

§ 7. Devise to the testator's daughter, Ede, wife of A. S. and her children born or to be born; that is to say, to the said Ede the sole use and improvement of one third part of the same so long as she shall live after the death of her said husband, Alexander Scammell, if left a widow, and the other two thirds to be equally divided between my said grandchildren, their heirs, &c. as well the reversion of the third part as the other part without reserve. Held, said grandchildren took immediately on the testator's death a bare or qualified fee in the third part determinable on the event of the mother surviving the father; upon her dying before her husband, the bare fee become absolute. If she survived him, she took a life estate with remainder to her children; it appearing the testator meant to dispose of her whole estate, and also intended her husband, A. S. should have none of it. The principal point urged was, that during the life of said Ede's husband, A. S., there was no devise &c., so the estate descended to him and his brother as heirs at law of the testator; so half liable to be taken by the plt. in execution against said A. S., then *assumpsit* lay for the rent. See *Goodright v. Goodridge*.

3 Cranch, 97
to 139, Lam-
bert's lessee
v. Paine.

§ 8. A devise of "all the estate called *Marroubone* in the county of Henry, containing by estimation 2585 acres of land," carries a fee,—was decided in ejectment in Virginia; numerous cases cited. All the cases cited were English.

14 Mass. R.
496.

§ 9. No fee if husband empower in his will his wife to sell lands for her support, if the personal estate be insufficient. The insufficiency is a condition precedent that must be proved; *secus*, her sale is void.

CHAPTER CXXIX.

ESTATES IN TAIL.

ART. 1. *General principles.*

§ 1. As there are but few such estates in this Commonwealth, and not many in the United States generally, this is a branch of the law not very important. And as they now can be conveyed away in fee by our statute of March 8, 1792, and are liable for debts, as stated in a former chapter, and as by the last section in that act estates devised to parents for life, and after their decease to their children or heirs, are made life estates only in the parent and fees by purchase in the children, which before were estates in tail, the number of such estates are and will be much diminished. And many of the disputes that arose before this act was past, out of estates devised or conveyed to a parent for life, remainder to children or heirs, if estates in tail or not are now at an end.

§ 2. Common recoveries too when in use occasioned much critical learning in regard to these kinds of estate. But those recoveries now being pretty much out of use, this learning is no longer of any use, except in regard to titles heretofore acquired.

§ 3. Estates before the statute *de donis*, in fact fees simple conditional, that is, fees simple determinable on some future event, as failure of issue of the donee or devisee. This fee conditional at common law was a fee restrained or limited to some particular heirs of a person exclusive of others, as to the heirs of a man's body, which admitted his lineal, and excluded his collateral heirs, or to the heirs males of his body which excluded not only his collateral heirs, but his female lineal heirs; conditional, because if the donee died without such particular heirs, the estate reverted to the donor; also it was held, there was a condition in the donee's favour, to wit: if he had heirs of his body of the description mentioned in the gift, the estate remained to him. "They therefore called it a fee simple on condition he had issue;" so that as soon as he had issue the condition was performed and gone, and his estate became absolute,—at least, 1. To enable the tenant to alien it: 2. To subject him to forfeiture for treason: 3. To encumber the land; but if the tenant did not alien the land, it descended according to the gift, and reverted when that was at an end. Thus stands the law now as to annuities, which charge only the person, and chattels personal which savour not of the realty, and an office which merely relates to such

Nor are they affected by corruption of blood, 473.

2 Bl. Com.
110 to 113.—
1 Sul. Lect.
283, 289, 290,
300.—
1 Cruise, 25,
29, 30, 31,
33.—4
Cruise, 111.

CH. 129. personal. It has been held, that an annuity in fee granted by the crown out of the four and a half per cent. duties was

Art. 1.

Doct. & Stud.
91.—1
Cruise, 35.

merely a personal inheritance, and not entailable. By a grant, therefore, to a man and the heirs of his body of an annuity, he has only a fee conditional at common law, and the true way to bar his heir is by a simple sale or conveyance, to wit, by grant or release.

But in regard to tenements, fees conditional are now made fees tail by the statute West. 2, 13 Ed. I. c. 1, called the statute *de donis*. But this fee simple conditional at common law turned into an estate tail by that statute, was very different from the modern fee simple conditional. This old estate was limited to the heirs of the body, excluding collateral. The modern fee simple conditional extends to all the heirs including collateral, and is a fee simple determinable on a certain event, as appears in another chapter, and neither is like the base or qualified fee; as where land is granted to A and his heirs, tenants of Dale, in this case when the heirs of A cease to be tenants of Dale the grant is at an end. And now if the tenant in tail bargains and sells, or leases and releases to A in fee, or covenants to stand seized to his use in fee, A has a base fee, which continues till the issue in tail enters, and does not determine on the death of the tenant in tail: because 1. The tenant in tail has an estate of inheritance in him: 2. He has the whole estate tail in him, and by such act divests it out of himself and vests it in the bargainee: 3. He has a disposing power over the estate. A base fee is subject to disclaimer, and is devisable, and no reversion on it.

§ 4. "An estate tail has five incidents essential, none of which can be taken away by any condition: 1. To be punishable of waste: 2. That the wife has dower: 3. That the husband shall be tenant by the curtesy: 4. That tenant may suffer a common recovery: 5. That collateral warranty either with or without assets, if made before the 4 & 5th of Anne, 16, or lineal warranty with assets may bar it. 4 Wood's Con. 60, the warranty is omitted, and four incidents only are then mentioned. So is 6 Co. 40, 41, Mildmay's case; but not subject to merger. 1 Cruise, 38.

West. 2 "has so appropriated the land to the tenant in tail and the heirs of his body, that if land be given to a man and the heirs of his body, to the use of another and his heirs, the limitation of the use is void." And the claims by purchase, 1 Cruise, 42.

§ 5. "*Tenement*, which is the only word used in West. 2, includes not only land, but things issuing out of, or concerning, or annexed to land, or exercisable in a certain place, as rents, *estovers*, uses, charters, names of dignity, as duke &c. of such

2 Bl. Com.
109.—Co.
Lit. 30.—
1 Cruise, 23,
46.—Far. R.
22, 23, 26,
Michael v.
Clerk.—
1 Cruise, 46.
—6 Cruise,
20.—1
Cruise, 149
—2 Cru. 465.

1 Cruise, 56,
2, 9, 309.—
2 Bl. Com.
116.—Co.
Lit. Abr. 315.
—1 Cruise,
38, 44, 117,
120, 148.—4
Cruise, 56.

Co. Lit. 19.

Co. Lit. 19,
20.

a place, advowsons, local offices, as Marshall of England &c. **CH. 129.**
 The word, *heirs*, is absolutely necessary in a grant, though not **Art. 1.**
 in a devise, for in wills, estates tail may be created by devise to A and his seed &c.

§ 6. A devise to A and his heirs males, gives an estate in tail, and the law supplies the words, *of his body*; but there must be the word, *heirs*, or some equivalent words; the word, *body*, or some other words of procreation. **2 Bl. Com. 115.**

§ 7. In this case, the tenant in tail, in consideration of the marriage of his son, covenants to stand seized to the use of himself for life, remainder to the use of his son and heir, and the heirs males of his body, by his intended wife, with several remainders over, and after he suffers a recovery in which he himself is tenant to the *præcipe*, and vouches over the common vouchee, which recovery was to other uses than those mentioned in the covenant." The question was, if after this covenant the tenant in tail remained so seized as to be tenant to the *præcipe*. Holt C. J. held, that bargain and sale, and covenant to stand seized, both raise a use without transmutation of the possession. Bargainee in fee of tenant in tail, has an estate, that continues as above stated: "none can give an estate tail to a use." If tenant in tail grants all his estate to one and his heirs, it puts the estate tail in *abeyance*, and conveys a base fee. By bargain and sale the right of the estate tail is conveyed, but by covenant to stand seized to his own use for life, it may not be, for he is already so seized, and he cannot bind his heir without making an alteration of the estate tail. And the court held, he remained seized after the covenant, so as to be tenant to the *præcipe*. The statute *de donis* makes no alteration of the estate, but only fixes it, so that there shall not be an alienation of it to the disinheritance of the issue in tail; yet so as a base fee may be made of it. Tenant in tail may turn his estate into a defeasible fee; and if tenant in tail make a feoffment, or levy fine, the issue is driven to his action, and his entry is taken away. Bargain and sale by tenant in tail, does not work a discontinuance. If the issue accept rent he confirms the lease of tenant in tail after his death. And covenant to stand seized to his own use, does not alter the estate tail. **Farr. R. 18 to 28, Michaelz. Clerk.**

§ 8. An estate after possibility of issue extinct, has four qualities of an estate for life: 1. It may be forfeited by a feoffment, &c. made by tenant in tail: 2. It may be drowned by an estate of inheritance descending on him: 3. May be exchanged for an estate for life: 4. On his default he in reversion or remainder may be received. And a tenant in tail after possibility of issue extinct, is where land is given to husband and wife in special tail and one is dead without issue, or **Doct. & Stud. 103—2 Bl. Com. 125.—1 Cruise, 97, 98, 99, 100, 101, 102; may be of a remainder, 99.**

CH. 129. if they have issue and then one of them dies, and then that issue dies without issue: and such tenant in tail has eight qualities a tenant for life has not: 1. He is not punishable for waste: 2. Not compellable to attorn: 3. He shall not have aid of him in reversion: 4. On his alienation no *consimili casu* lies: 5. After his death, no writ of intrusion: 6. He may join the *mise* in a writ of right, in a special manner: 7. In a *præcipe* by him he shall not name himself tenant for life: 8. In a *præcipe* against him he shall not be named barely tenant for life; nor can any of these privileges be transferred to his assignee.

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Co. Lit. 27.—
Doct. & Stud.
102.

2 Bl. Com.
103, 104.—
Co. Lit. 19,
20, Abraham
v. Bubb.

§ 9. Estates in tail are general, as to all one's issue, or special, as to issue by a particular wife or husband. So to the male sex, or to the female sex, and then the male or female claiming must make his or her descent wholly in the male or female line, as the case may be. Hence if donee in tail male has a daughter, and she has a son, such grandson cannot inherit, as his mother has nothing to descend to him.

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§ 10. A. D. 1636, the Colony of Plymouth passed an act, and thereby enacted, "that all lands entailed, or to be entailed, shall descend and enure, as by the law of England the same ought to do"

§ 11. A. D. 1650, the Colony of Massachusetts prescribed the form of a deed of an estate tail, as before stated.

Yelv. 170,
171.

§ 12. An estate tail by implication, can be only when it is doubtful what estate is given: see below. Intrusion can be only after a freehold ended, not on an estate in fee simple.

ART. 2. *What words give an estate tail or not.*

§ 1. Already in treating of executory devises, and the conveyances of remainders, uses, and trusts, Ch. 114; and occasionally many cases have been cited, shewing what words do or do not give an estate tail; and especially Ch. 125, a. 5, estates by purchase not by descent.

4 D. & E. 82,
Doe v. Ap-
plin—2 Wils.
322, Roe v.
Grew.

§ 2. A devise to A, "to hold during his natural life, and after his decease to and among his issue, and in default of issue" then over, is an estate tail in A, and not for his life merely. And so it is, though the words, *and to the heirs male of the body of such issue*, be added. The general intent must govern the construction. No issue when the will was made &c.

2 Fearné Ex.
Dev. 116, 119,
Moore v. Par-
ker.—4 Maule
& S. R. 61.

§ 3. This was a settlement on the son of B, for life, remainder to the sons of his first marriage, successively, in tail male, the reversion to the seller in fee; then he devised to B's sons according to the settlement, (and if B died without issue, legacies charged, &c.) then devised to the issue of B, by any other wife, in tail male, (not in *esse*,) and on failure of issue male of B to grandchildren.

The court held, B took no estate tail, for the will gave him nothing; and that the settlement and devise were distinct conveyances; that his life estate in the settlement could not be tacked to the devise to the issue &c. in the will,—so he had only the estate given to him in the settlement,—though it was urged, he took an estate tail by implication on the words, *failure of issue male of B*; for there was no estate given him by the will, as a ground for implication to work upon.

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4 Cruise, 442
to 463, 478.
—2 Cruise,
330.

§ 4. The settlement was on B, for ninety-nine years; his sons in tail male &c.; reversion to the testator in fee; devise, on failure of issue of his body, to F in tail. B has no estate tail by implication. Hence the devise to F is executory, and void, as being on too remote a contingency, being on failure of issue generally.

2 Fearn of
Ex. Dev. 119,
&c. Lanesborough v. Fox.
—6 Cruise,
406.

§ 5. A having two sons, W and R, devised, that if W, the oldest son, die and leave no issue, then the inheritance to R, and his heirs, after W's death. Held, W had an estate tail by implication, and R's estate was a remainder, and not an executory devise. 271, a life estate to A, remainder to his issue, united on feudal principles, not on any implication, the testator intended it. This applies not to personal estate. An executory devise made a remainder by raising, by implication, an estate in tail, in the person on failure of whose issue the estate is devised over. 6 Cruise, 474, cites Walter v. Drew.

2 Fearn of
Ex. Dev. 197,
Walter v.
Drew.—6
Cruise, 283,
474.

§ 6. "Walter Husband, May 2, 1763, devised certain estates so his grandson, N. Webb, for life, without impeachment of waste, and after his decease to the issue male of his body, lawfully begotten, and to the heirs and assigns of such issue forever; and for want of issue male, then to his grandson W. Webb, for life, with remainder to the issue male of his body, and the heirs and assigns of such issue male, and for default of such issue male, then to his grandson, J. Webb, (lessor of the plt.), for life, remainder to his issue male in like manner. On the death of the deviser, N. Webb entered on the premises, and having suffered a recovery of them to the use of himself in fee, devised them to W. Webb in fee. N. Webb died 1774, on whose death W. Webb entered, and he or his widow continued in possession to the time of the action. W. Webb was heir at law of the deviser, and the debts derive title from him. Both N. and W. Webb being dead, without issue, J. Webb, lessor of the plt., claimed under the will of W. Husband. Judgment for the debt., on the ground N. Webb took an estate tail; and if not, but tenant for life only, then his recovery destroyed the contingent remainders, being had before issue born, and the issue's estate being contingent, all the after remainders were so.

6 D. & E. 299,
Denn v.
Puckey & al.
—8 D. & E.
9.—1 East,
229 —6
Cruise, 294.

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6 D. & E. 335,
Denn v. Slater.—See also
Cowp. 480.
—6 Cruise,
270, 286.

§ 7. John Slater devised his lands “to his nephew, Isaac Slater, but if the aforesaid Isaac Slater shall die without male heir, then my will is, that my nephew, John Slater, shall enter upon and enjoy the said lands, his heirs and assigns forever,” provided said Isaac paid the widow £8 a year, during her life, and £20 to A and B each, within four years &c., out of said lands, and 15s. to another in ten years &c., out of said lands. Isaac paid these sums. The court held, he had an estate tail; that *male heir* in a will means male heir of the body. And 3 Salk. 336, Lord Ossulston’s case. In a deed heirs generally and paying, or paying out of an estate, will not turn an estate fixed in tail by express words into a fee; nor an estate for life expressly given for life. But where doubtful, if for life or in fee, then the words *paying* &c. may be construed to give a fee. The effect of a power to turn a fee tail by recovery into a fee simple.

2 Fearn Ex.
Dev. 198,
199, 204, 205,
222, 223.

§ 8. A devise to C and the issue of his body living at his death, and for want thereof a devise over. Held, C had an estate tail. Also a devise to three persons, each to him and his heirs and assigns, and if either died without issue, then to the survivors &c., is an estate tail. Other cases of estates in tail, 3 Mod. 133; 1 Burr. 268; Cro. Jam. 448; 2 W. Bl. 1083; 1 Vent. 231.

6 D. & E. 307,
Daintry v.
Daintry.—
Cro. Jam. 415.

§ 9. This was a case sent by the master of the rolls ‘&c. John Daintry, August 15, 1785, among other things gave, by will, an annuity to his son John, his sole heir, till he married, and then added, “in case my son shall happen to marry before he attains the age of thirty years, then I give and devise to him, and the heirs of his body, all my real and personal estates subject to pay &c.; and, if he happen to die without leaving issue of his body,” then over to the testator’s brother. The court decided, the son took an estate tail, in the real estate, by the last words, namely, *if he happen to die without leaving* &c., and the personal estate absolutely. Not leaving issue related to his death, as to the personal estate; but not as to the real.

Cowp. 234,
Morgan v.
Griffiths.—6
Cruise, 280,
Goodright v.
Goodridge.

§ 10. “Thomas Griffiths devised lands to his grandson Thomas Griffiths, for and during his natural life, and after his decease to his heirs and assigns forever; and for want of such heirs, I do give said lands to Thomas Evans, his heirs and assigns, forever.” Said Evans was another grandson of the testator. Held, that Thomas Griffiths took an estate tail, and not a fee, as urged. Evans being among those that might be an heir, the word, *heirs*, is restrained to *heirs of the body*. Estate tail by implication. Ch. 127, a. 13, s. 14.

Cowp. 410,
412, Denn v.
Shenton.—6
Cruise, 274.

§ 11. Ejectment and special verdict. William Geering seized &c., November 28, 1738, devised to his grandson, Samuel Shenton, certain meadow ground, to hold to him and

the heirs of his body, lawfully to be begotten, and their heirs forever, to pay £8 a year to M. S., for life ; but in case said Samuel Shenton shall die without leaving issue of his body, then over to William Geering in fee, chargeable &c., and all the rest and residue of his goods, chattels, real and personal estate, whatever, after payment of debts, legacies, and funeral charges, he gave to said Samuel Shenton, his heirs, administrators, and assigns.

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The testator died 1739, said Samuel Shenton entered and died seized, leaving issue Samuel Shenton the younger, who also entered and died seized. He attained the age of 21, and died in 1768, having by his will of April 23, 1767, devised the premises to his mother, the deft., in fee, who entered and is seized. Judgment for the plt. son of said W. Geering, for said Samuel Shenton was only tenant in tail ; the words, *and their heirs forever*, being qualified by the words, *and shall die without leaving issue* ; no notice was taken of the £8 a year. Here the fee tail was expressly given.

§ 12. This was a devise to A for 99 years from the testator's decease, if he live so long, and after that to the heirs of the body of A, remainder to B for 99 years from the decease of A, he dying without issue, if B so long live. Held, the heir of the body of A took an estate tail by executory devise, and, during A's life, the freehold is not disposed of, and descended to the testator's heir at law ; a remainder devised to A's right heirs male must be intended right heirs male of his body.

1 W. Bl. 645,
Harris v.
Barnes & al.
—6 Cruise,
518.—Ossul-
ston's case. 6
Cruise, 459.

§ 13. Henry Cook seized in fee of the premises, January 19, 1792, devised them to his son Richard Cook, for the term only of his natural life, and after his decease to the lawful issue of his body, as tenants in common, but if he die without leaving lawful issue, then and in such case after his decease, I devise the same to Elizabeth Harding, her heirs and assigns : the testator died 1793. Held, Richard was tenant in tail, and no cross remainders among his children. The intent was that Elizabeth Harding should not take while he had issue left. Here there was a general intent to be effectuated to keep the estate in Richard's family, while any issue remained, and this could be done but by making his estate an estate tail.

1 East, 229,
Doe v. Coop-
er, cited 6
Cruise, 295,
417.
See Robin-
son v. Robin-
son, cited 6
Cruise, 290,
291.

§ 14. Christopher Stevens devised to his son William Stevens when of the age of 21 years, the fee simple, and inheritance of Lower Shelstone "to him, his child or children forever ;" "but if he die before 21, then to the testator's wife." When the testator died, William was about 15 years old, and had no children, and attained 21 years. Lord Mansfield said, if the testator had used the words, "all his estate," "inherit-

Dougl. 320,
Davie v. Ste-
vens, &c.
cited 6
Cruise, 281.

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ance," or "forever," and stopped there, a fee simple had passed. But the words, "child or children," are as if he had said, "if my son die without heirs of his body;" and "to give the father an estate in fee would be to strike those words out of the will; they must operate to give him an estate tail, for there were no children born at the time, to take an immediate estate by purchase;" the meaning is the same as if the expression had been, *to William and his heirs*, that is to say, his children or his issue; "the word *forever* makes no difference, for William's issue may last forever." Upon this case it may be observed: 1. The estate was not devised to William for life, so no express life estate: 2. The devise was, to him, his child or children, and not to him, and after his decease to his children, so making his children distinct devisees, instead of continuing his estate to them: 3. It is strongly implied in the judgment, that if there had been issue at the time, "to take an immediate estate by purchase," they would have so taken. Nor would a case like this come within our statute of March 8, 1792.

Dougl. 431,
 484. Hodges
 v. Middleton.


§ 15. In this case Francis Bladen, devised all his real estate, &c. in Basting to Anne Middleton, during her life, and at death to her children, on condition to pay £80 a year by her and them &c., and in case of failure of children in said Anne, then over. She entered on the premises and enjoyed them to her death; she had seven children living at the death of the testator, and she left six children at her death, and died one year after the will was made. The plt. claimed as heir of the testator. The counsel for the deft. said Anne Middleton took an estate tail, or if her children took a remainder in fee, as purchasers, the plt. was barred. But the deft's. counsel laid stress on the words, "in case of failure of children," as having "issue in general" in contemplation, and not merely children or descendants in the first degree, and if Anne Middleton took only an estate for life, he contended that her children took an estate in fee. Court thought she took an estate tail.

3 Salk. 296,
 337.
 2 Fearn,
 179.—4
 Maule & Sel.
 362.

§ 16. A devise to B for life, and after his decease to the issue of his body, and for want of such issue remainder over, B has an estate tail to him and his heirs. And for want of such issue of him, &c. is an estate tail in a deed. Daughter took an estate in tail when the testator said he meant it but for her life.

9Co.127, 129.
 Sonday's
 case.—1 P.
 W. 149.—1
 Ves. jr. 143.

§ 17. This was the devise of a house "to Thomas, and if he marry, having a male issue of his body, lawfully begotten, then his son to have the house after his decease; if he have no issue male, then to Richard," another son of the testator; in like manner and in like form to other sons of the testator; and he added, if any of his sons, or their heirs males, issue of their

bodies, attempted to alien, &c. then the next heir to enter, &c. **CH. 129.**
The court held, that Thomas had an estate tail male. 1. Be- **Art. 2.**
cause if he hath no issue male, then Richard to have the 
house; that is, if Thomas died without issue male, then the
house to go to Richard: 2. If sons or their heirs male, issue
of their bodies, shall attempt &c.; this explains the first words,
that the male issue shall be heir and take by descent; the next
heir to enter, this also explains: 3. Thomas being restrained
to alien, &c. implies that without restraint he would have the
power; this he could not have as tenant for life only, and
Thomas had no son when the will was made, and this was a
devise to him and all his male issue, and all the words taken
together made a fee tail. If A devise black-acre to B in tail, 6 Cruise, 305.
and also white-acre, he has both in tail.

§ 18. One had two sons, A and B, and devised lands to A 2 Bac. Abr.
 for his natural life, and after his decease to the issue of his 59.—Vent.
 body lawfully begotten on a second wife, (A having a first 214, King v.
 wife then alive,) and for want of such issue, to B and his heirs Melling,
 forever, with power to A to make a jointure to a second wife. cited 5
 6 Cruise, 467.

§ 19. Adjudged in the K. B., against Yates' opinion, that A 6 Cruise, 359.
 had but a life estate; but this judgment was reversed in the
 Exchequer Chamber, and there held, he had an estate tail.
 The reasons were,

1. *Issue* is *nomen collectivum*, and a stronger word than
children, which takes in only the immediate descendants of
 the parents: but *issue* takes in all from generation to genera-
 tion; and so long as there is any issue of A, the remainder is
 not to take place: 2. In statutes, *issue* is as comprehensive as
heirs of the body, as in West. 2, *de donis*, it is said, *quo minus*
ad exitum descendat, which takes in all issues in *secula seculo-*
rum: 3. He had no issue at the time, for then it would, as
 this case is, vest in them by way of remainder; but having
 none, leaves it to the construction of law upon the import of
 the word *issue*: 4. It is issue of his body begotten, which is
 an use of an estate tail: 5. It is said, and for want of *issue*,
 which is a phrase agreeable to an estate tail: 6. It is in
 case of the creation of an estate tail, where *voluntas donatoris*
 has some influence: 7. It is in case of a will, where the in-
 tent of the testator is to govern.

§ 20. If a man devises land to another and his issue, this 3 Com. D.
 is an estate tail if he have no issue alive;—so, to another and 398, 399, 400.
his children, if he has no child living; to another and *the fruit*
of his body; to A and *his heirs lawfully procreated*; to *the*
heirs males of the body of B now living, the son of B has an
 estate tail; to A and *his issue male*; to A and *if he die without*
issue to another. So to A and *if he dies not having a son &c.*
 he takes in tail male. So, to A, and *if he marries and has*

CH. 129. *issue male, his son shall have it, and if he has no issue male, B shall have it.* So, to A for life and then to B, and if A and B and his heirs die, and his sister survives them, she shall have it, B has an estate tail. So, to A for life, and afterwards to his heir male.

1 Atk. 432,
Wyld v.
Lewis.

§ 21. A devised to B his wife all his lands not in jointure ; and added, if she has no child by me, and for want of such issue then to his brother, &c. By the first words B took an estate tail, and this could not be controlled by subsequent words.

8 D & E. 211,
Doe v.
Whichelo,
cited 6
Cruise, 217.

§ 22. This was a devise to "A and B and their heirs forever, provided that if both have issue, then both their dividends to go to the issue of their own bodies ; but if but one have issue, then the premises to go to that issue." A and B took estates tail, then A conveyed his half to B in fee, by lease and release, and covenanted to levy a fine. B had a base fee in A's moiety. And in cases of tail estates the half blood inherits as effectually as the whole blood. 5 Vesey jun. 388 ; 1 Bac. Abr. Descent C, Am. Ed. ; 3 Co. 41. ; 3 Bos. & P. 643.

7 D. & E.
272, Doe v.
Rivers.—6
Cruise, 276.

§ 23. This was a devise to A and her heirs, and if she died without issue, then she was enabled to dispose of the estate by will or deed ; and for want of such issue and direction, &c. then to the devisor's right heirs. Held, A, who had issue, took an estate tail.

1 Bos. & P.
243, White-
lock v. Hed-
don & al.

§ 24. This was a case out of chancery. The testator devised "all his freehold, leasehold, &c. estates," to A in fee, provided that if B shall have "any son or sons," then "to such male issue B shall have, when A attains 21 ;" but A to have the rents and profits of the estates till he attains 21 ; by a subsequent clause he gave "all the residue of his real and personal estates whatsoever not before disposed of to A, his heirs, &c. forever ; B had one son, who died before A attained 21, and a second who was born three weeks after that period. Held, the first son took nothing, but that the second son took an estate in tail male, he was at the time in *ventre sa mere*. And in this case all the judges said the word *estate* in a will may convey a fee, fee tail, or life estate, according to the context. The word *son* understood to mean issue. 6 Cruise, 281.

2 Stra. 1125,
Coulson v.
Coulson.—
6 Cruise, 326,
348, 391.

§ 25. This was a case out of chancery, in which "Robert Bromley devised to his grandson Robert Coulson, and his assigns, for his life natural, the reversion of lands expectant on the death of the devisor's sister, and from and after the determination of the estate for life of his said grandson, then to trustees during the life of his grandson to preserve contingent remainders ; and from and after the death of his grandson

unto the heirs of his body, lawfully begotten and to be begotten, and divers remainders over. Held, the grandson took an estate tail.

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§ 26. This was a devise to A for life, and after to his heirs males of his body and his heirs forever, and for want of such heir male, remainder over. Held, A took an estate tail.

2 Ld. Raym. 1437.—2 Stra. 729, Goodright v. Pullin.

§ 27. In *Doe v. Applin*, Lord Kenyon said, "the court is to put such a construction on the whole of the will, as will best effectuate the general intent of the deviser, contrary to one of the limitations, if a different construction will defeat the general intent." Buller J. said, "the word *issue* may mean children or heirs of the body; but it is too much to say it means children in this will; for then grandchildren would be excluded, and the next clause, *in default of issue*, could not have any effect at all; it therefore must mean heirs of the body."

4 D & E. 82, above stated. 6 Cruise, 333, 354.—Attorney General v. Sutton, 1 P. W. 754; 142, Bale v. Coleman.

§ 28. On a devise to the heirs males of the body of A, one who is heir male and not heir general shall take by purchase, from the plain intent of the testator, not controlled by rules of law.

1 Stra. 35, 42, Brown v. Barkham.

§ 29. This was a devise to A's three sons, successively, in tail male, remainder to all and every other son of A, without naming any estate, remainder for want of such issue to B in tail male; the after born sons of A take estates tail male. Twice argued. In this case the court connected the devise as to the after born sons with the prior and after devises. 6 Cruise, 285.

1 W. Bl. 499, 521, Evans v. Astley.—2 W. Bl. 1002, 1159, 1083.

§ 30. S. Fielding seized in fee, devised to A for life without impeachment of waste, remainder to his eldest son and to the heirs of such eldest son, and in default of issue male of A then to B, &c. Held, A took an estate for life, remainder to A's eldest son in tail, remainder to A in tail, by reason of the words, *in default of issue of A's body*, hence A could suffer a recovery with double voucher, &c. See *Bean v. Halley*. But a devise to A for life without impeachment, and a power of jointure, makes him tenant in tail where he has no issue in the testator's life time, &c. Decided in *Grew's* case above.

8 D & E. 5, 13, Doe v. Halley. Willes, 355.

§ 31. In this case J. S. took an estate in tail by the testator's codicil, independent of his will, which gave him a different kind of estate. In this case most of the prior cases on this subject were cited. The court considered in this case the codicil "as a substantive will."

3 East, 548, Frank v. Stovin.

§ 32. G. Morris devised to A and the heirs of her body, lawfully to be begotten, whether sons or daughters, as tenants in common, and in default of such issue then over. A took an estate in tail.

2 Bos. & P. 485, Seale v. Barter & al. 7 D. & E. 531.

5 East, 548, Pierson v. Vickers.—3 Bos. & P. 620.

CH. 129. § 33. Devise to the testator's son Joseph and his heirs and Art. 2. assigns forever, but if he died without issue, then to the child of which his second wife was *ensient*. Joseph took an estate

in tail. See also 3 Wils. 399 ; 5 D. & E. 320 ; Ambl. 385 ; Cro. Jam. 415 ; Webb v. Hearing.

§ 34. A devise to A for life, remainder to his heirs of his body, is in tail, though trustees be interposed. As where A devised lands to B for life, without impeachment of waste, remainder to trustees and their heirs, during B's life, to support contingent remainders, remainder to the heirs of B's body, remainder over. Held, the remainder to the heirs of B's body, was within the general rule, and must operate as words of limitation ; hence create in B a vested estate tail ; and breaking " into this rule, would occasion the utmost uncertainty." And the same rule was recognised in Sayer v. Masterman, 6 Cruise, 326 ; for the limitation to trustees does not control the estate tail. So though another estate interpose between the life estate to B, and that to the heirs of his body. See Coulson v. Coulson, ante, s. 25. Several cases cited in 2 Stra. 1125, *pro* and *con*. Also the case of Hodgson v. Ambrose, cited to one point, Ch. 125, a. 5, s. 38. And the same rule holds, though the estate for life arise by implication. 2 W. Bl. 698.

Dougl. 337,
Hayes v.
Foorde.
Burley's case.

Ambl. 453.

So the rule applies, though the limitation be to the *heir male* of the body, in the singular number. 1 Vent. 230 ; cited 6 Cruise, 332, Wilkins v. Whiting ; 1 Roll. Abr. 836. And though the devise add, and in default of such *heir male* over &c., these words, *heir male*, are to be understood if there be no words to control that meaning. So the rule applies, though words be superadded to the word, *heirs*. Shelly's case ; see Goodright v. Pullin, s. 26 ; 1 Call, 344 ; 2 Call, 316, 520.

§ 35. The effect of words superadded, as in Goodright v. Pullin, as a devise to A for life, and after to the heirs males of his body and his heirs, and for want of such *heir male*, then over. So Shelly's case, especially Ch. 125, a. 4, s. 13, and the distinction there taken. If the words be, *heirs* of the body in the *plural*, then superadding *their heirs* makes no difference, as the course of descent is not altered ; but if the words be to A and the *heir male* of his body (in the singular number) then superadding the words, *and his heirs*, the course of descent is altered, and A's *heir male* is a purchaser generally, and of course A has but a life estate. If in the plural is in tail. Shelly's case ; also, Legate v. Sewell, 1 P. W. 87 ; Morris v. Wood, 2 Burr. 1102 ; cited 6 Cruise, 334, 335. " The word, *heirs*, in the plural with words of limitation added to it, has never been construed to be a word of purchase ; but the word, *heir*, in the singular, has been construed to be

3 Atk. 749,
788.—King v.
Burdchill,
2 Burr. 1103.

a word of limitation. And many other cases. Plural, *Wright v. Pearson*, 6 Cruise, 339. The rule in *Shelly's case* is applied to *his child*. 6 Cruise, 343, 344. Many of the rules above, confirmed. 2 Burr. 1103. CH. 129.
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If in the singular, first estate is for life, and the heir male of the body is a purchaser. *Doe v. Laming*, Ch. 125, a. 5, s. 14; *Archer's case*, Ch. 125, a. 5, s. 8; also 6 Cruise, 356; *Loddington v. Kyme*, Ch. 125, a. 5, s. 9; several other cases, Ch. 125, a. 5, heirs in by purchase not by descent, *Backhouse v. Wells*, Ch. 125, a. 5, s. 28, and several other cases, Ch. 125; also cases, Ch. 130, especially a. 1, and a. 2.

The rule in *Shelly's case* is not applied where the limitation is to sons or children. See *Ginger v. White*, Ch. 128, a. 4, s. 8; and *Goodtitle v. Woodhull*, Ch. 130, a. 2, s. 19; *Goodright v. Dunham*, Ch. 125, a. 5, s. 26. So heirs explained to mean first and other sons &c. *Low v. Davies*. So *Grover v. Pew*, Ch. 128, a. 5, s. 1. *Children* mean issue, Ch. 125, a. 4, s. 10. 6 Cruise, 344.
345.

§ 36. *Other English cases of estates tail.* The Lord Keeper Henly said, that "in case of a will the intent must prevail, if not contrary to law; the meaning of which was, if the limitations were such as the law allowed; but did not mean that the words must be taken in such signification as the law imposed on them:" 2. If the usual words of limitation in consideration of law, appear in a will to be plainly intended as words of purchase, they must be viewed as such in law and equity: 3. "The safe way to determine property is to use words in the most known sense, unless it appears plainly that the testator meant them in some other." This reason was in a case in which decided, that monies to be laid out in lands to be entailed in a certain manner, must in equity be governed by the rules of law. Ambl. 374
Austin v.
Taylor.

§ 37. A *cestui que trust* in tail may require the trustee to convey and then suffer a recovery; trustees being since the statute of uses in the situation feoffees to uses were before it. An estate tail limited as a jointure cannot be barred, 1 Cruise, 56; no use results on the grant of it, 454. See Jones v.
Morgan, 6
Cruise, 342,
343.

§ 38. The ancestor's act the heir in tail may avoid by entry; nor is he subject to his incumbrances. But if a tenant in tail grant a rent charge to one having a prior right in consideration of a release, the grant will bind the issue. 1 Cruise, 54. But his contract cannot bind him in remainder or reversion. His alienation is only voidable and his alienee has a base fee. 1 Cruise, 46,
48.

§ 39. By the common law of Connecticut an estate tail became an estate in fee simple in the issue of the first donee in tail. A distribution of a deceased person's estate cannot be 1 Cruise, 41,
42, 48.
3 Day's Ca.
332, 260,
Hamilton &
ux. v. Hamp-
stead.

CH. 129. made by distributors appointed by the heirs and devisees.
 Art. 3. Munson v. Munson.

ART. 3. *American cases.*

5 Mass. R.
 438. Joseph
 Dudley v. El-
 izabeth Sum-
 ner.—Com-
 mon recove-
 ry to doubt-
 ful uses.

Plt's. title
 stated.

Tenant's
 pleas.

Points decid-
 ed thereon ;
 pleas not
 good.

§ 1. In this case Thomas Dudley, March 1765, was seized of the demanded premises in fee tail, and then suffered a common recovery in the Court of Common Pleas in Suffolk on single voucher, on the writ of Joseph Carnes, to the use of said Thomas, as the tenant said, whose estate she claimed, and to the use of Joseph Dudley deceased, as the demandant alleged, under whose will he claimed. The demandant brought *formedon* in descender, and stated that June 13, 1767, Joseph Dudley was seized in fee simple &c., and by his will devised the demanded premises to his wife Abigail Dudley, for her life, remainder in tail male to William Dudley, whose eldest son and heir in tail the demandant is, that the testator died January 1, 1774, that his will was duly proved, that his widow entered and became seized of the life estate, whereby a remainder in tail vested in his father William; that July 5, 1781, she and her husband, John Gray, by deed surrendered her life estate to said William, by which he became seized in fee and right to him and the heirs male of his body, and on his death the demanded premises descended to the demandant &c. The tenant pleaded four pleas at great length; and some of them ran to *surrejoinders*, upon which very voluminous pleadings were three points: 1. The first plea was *non devisavit*; the tenant meant this for general issue, and so under it to oblige the demandant to prove his whole title under the will, as the testator's title, seizin, devise, &c. and under it to prove his title; but the court held, it was a special plea and issue, and so the demandant under it had only to prove the devise,—as on *non feoffavit*, the party had only to prove the *feoffment*, and not as on *ne dona pas*, or *non dedit*, the general issue in *formedon*, on which the whole title must be proved.

Second. In suffering the common recovery there were indentures to declare the uses to Joseph Dudley, the testator, between Thomas Dudley, the recoveree, and Joseph Carnes the recoveror, executed by both, acknowledged by Carnes, but not by Thomas Dudley, and the part acknowledged by Carnes was recorded, but the other not. Thatcher J. who tried the cause, directed the jury to consider this indenture of no validity to give the use to Joseph Dudley, but left it in Thomas Dudley, the recoveree, because he was the grantor in this conveyance, within the meaning of our statutes, and his deed was not acknowledged or recorded; and this seemed to be rather the opinion of the court; but then it appeared the tenant only claimed to have the estate of Thomas Dudley, but stated in her plea no title to it, so that her title under him

was not in issue, and then she made no title ; but if she shewed his title, still his deed, though not acknowledged or recorded, was good against him and his heirs, and all persons but innocent purchasers and creditors without notice ; and she could not be considered without notice, as the common recovery was matter of record, and as Joseph Dudley, the person to whose use the recovery was intended, and those claiming under him, were in possession till about the time she purchased and entered. It seems to be the better opinion, that the three judges, Sedgwick, Sewall, and Parker, were right in this part of the case : because 1. It appeared by the pleadings of the parties, that both claimed under Thomas Dudley's title in fee tail ; and the tenant herself in her pleas stated, that he suffered the common recovery but to his own use, and so, as she said, turned his fee tail into a fee simple estate in himself ; and further pleaded she had his estate, but did not state how she had it. This she ought clearly to have done in evidence or pleading ; but in this case she could not in evidence, because she wholly waived the general issue on which alone could she prove her title in evidence ; and then in pleadings wholly special it was essential she should have stated *how* she acquired Thomas Dudley's title : 2. Because it also appeared in the tenant's pleading that she knew Thomas Dudley executed his deed to declare the use to Joseph Dudley deceased, in said recovery, though his said deed was not acknowledged or recorded, and that she knew he and his widow and said William were actually in possession, claiming under the said recovery, as above. This was enough to shew she was not an innocent purchaser without notice of said Thomas Dudley's deed ; and therefore, her case came within several cases decided on this point, before mentioned, as *Flucker v. Hall*, *Richardson v. Fowler & al.*

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Reasons.

There was another point in this case. July 5, 1781, John Gray and Abigail his wife, widow of said Joseph Dudley deceased, and Thomas Fayerweather, executor of his will, by their deed poll for a valuable consideration did give, grant, bargain, sell, lease, and release to said William, his heirs, &c. all their right, title, interest, &c. in and to the demanded premises, executed by all of them, and acknowledged by John Gray and Fayerweather, but not by said Abigail, and was recorded. Two of the judges, Sewall and Parker, held, this deed was sufficient to surrender her estate ; but Sedgwick was of a different opinion. On this point it was agreed the tenant had a mortgage deed from said William Dudley, and also a deed from his administrators, and the tenant contended this deed of John Gray and wife &c. was not a surrender of her life estate, if so, as his death was not alleged, the de-

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mandant could not recover during her life ; and if this was such surrender or not, was the question, and in fact a question of law improperly referred to the jury, as was said. The jury found, by direction of the Judge, that Joseph Dudley deceased *did devise* : 2. That said recovery was to the use of said Thomas Dudley : 3. That said Gray and wife *did surrender his life estate*, &c. to all which opinions the tenant filed bill of exceptions, on which this question as to the legality of the surrender arose.

Upon this point—the wife's deed not acknowledged by her, Parker J. thought valid against all persons not shewing title against her husband while living ; that had he “ alone conveyed, before the statute of 32 H. VIII. c. 28, it would have worked a discontinuance of her estate, so that she would have been put to her action ; and even since that statute it is a discontinuance, until entry by the wife after the death of her husband ; this issue then was properly found for the demandant.”

Sewall J. thought as there was a seizin proved under this deed, it was a valid surrender against all persons, but “ an innocent purchaser, or creditor without notice,” though not acknowledged by the wife ; he had before stated on another point that the tenant did not appear to be such,—so the verdict was right as to this deed.

Segwick J. agreed in some points and differed in others. He held, Thomas Dudley was clearly the grantor in this common recovery, within the meaning of our statutes ; hence on a general principle it was essential his part of the indenture should be acknowledged by him, and recorded in this case, as one part of the indenture was executed by him and the other by Carnes only ; and therefore here was a defect, but then that the tenant could not take advantage of it, as by the pleadings, and her confession, it appeared Thomas Carnes executed the deed as grantor to lead the uses, that by the pleadings it appeared the recovery was had and seizin given on execution and possession taken and continued accordingly, that this made the deed valid against him and his heirs though not acknowledged or recorded ; and so good against the tenant as she derived no title from Thomas Dudley. Her saying she had his estate was only giving color, “ and without alleging any fact on which issue could be taken.” The case might have been otherwise, had she derived title from Thomas Dudley or his heirs, by *bona fide* purchase, without notice, [if she could have so pleaded and proved the facts, it is clear she lost the cause on this defect in pleading.] He thought the jury incompetent to try the issue, if the common recovery was or was not to his use, as it was “ merely the legal result of the

facts" stated, and this seems to have been a correct opinion, as it was a question depending on the legal construction of the statute. CH. 129.
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As to the wife's deed he thought it invalid as it was essential she should have acknowledged it, and as to the possession given to said William, it was the husband's act, she could not resist, hence he inferred there was no legal surrender of her life estate, and so the demandant not entitled to recover.

In this case all the court agreed, as this was a review the court had no power to allow an amendment in the pleadings.

Also in this case two of the subscribing witnesses to the deed of Gray, &c. being dead, one interested as vouchee, the demandant was allowed by his affidavit to prove the fourth out of the reach of the process of the court, that is by stating facts that shewed he was probably in Connecticut, and then to prove by disinterested witnesses the hand writing of one of the deceased witnesses.

In this case Judge Thatcher was of opinion it was not necessary for the wife to acknowledge her deed of her life estate, it being a mere surrender of it, to him in remainder. Judge Sedgwick's opinion was the reverse. And can there be a doubt upon our statute but that she is a grantor, who must acknowledge her deed, whenever she transfers her freehold or inheritance to another by surrender or otherwise. A freehold in houses or lands passes from her to another by force of her deed, and for her to acknowledge such a deed has been the general practice. This is the only case recollected in which it has not been done.

§ 2. The plts. in error and original plts. were children and heirs of Moses Hawley deceased. He brought an action, entry *sur disseizin*, and counted on his seizin in fee, and on a disseizin of said inhabitants, in which he demanded sundry parcels of land in Northampton, and one undivided third part of certain other lands there; plea not guilty. The jury found in their verdict, among other things, a common recovery formerly suffered by Joseph Hawley Esq. under whose last will said inhabitants held, and judgment for them 1792. September 1809, the defts. pleaded in *nullo est erratum*; agreed to have the verdict amended so as to let in the fact the common recovery had been executed. To do this, judgment was reversed, and a *venire de novo* issued, and a special verdict found April 1810, and in that the jury found that July 29, 1751, one Ebenezer Hawley being seized in fee of the demanded premises, devised among other things as follows, "Further I give to my said wife the whole use, income, and improvement of my house, barn, and house lot, and one half of all my land lying in the common field or meadow, so called,

8 Mass. R. 3,
David Hawley & al. in error, v. Inhabitants of Northampton.

Common recovery amended.

Special verdict finding devise, &c.

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in Northampton, and of one third part of my out or wood lands, for and during the term of her natural life and no longer; and I give the other half of," &c. [so designating several parcels,] "to said Elisha Hawley" [nephew of the testator] "immediately to be possessed after my decease; and the remainder of the other half of all and each of last said lots, and the remainder of all my homestead with the buildings thereon, to come into possession immediately after my wife's decease, to have and to hold to him the said Elisha Hawley, his heirs and assigns forever, on the conditions and contingencies hereinafter mentioned; also, I give to the said Elisha Hawley" [designating another specific parcel of land] "for and during the term of my said wife's life, and no longer; also, I give to the said Joseph Hawley my nephew, the one half of" [designating sundry other parcels of land of which he had before devised the one half to his wife for life,] "to come into possession immediately on my decease, and the remainder of the other half of all the last mentioned lots or pieces of land, and the remainder of the whole of the before mentioned lot, which my said wife and the said Elisha Hawley are to have the use of during the life of my said wife, to come into possession immediately, on my said wife's death: to have and to hold to him the said Joseph Hawley, his heirs and assigns forever, on the conditions and contingencies herein after mentioned. Also, I give all my woods or outlands to the said Joseph Hawley, and Elisha Hawley, two thirds thereof in immediate possession, and the possession of the other third part thereof expectant on my wife's decease; to have and to hold the one third part of all my said woodlands to him the said Joseph Hawley, his heirs and assigns forever, on the condition herein after expressed; and the other two third parts of the said woodlands, to him the said Elisha Hawley, his heirs and assigns forever, on the condition and under the limitation hereinafter expressed." Then followed the clause on which the real question arose, to wit: "and it is my will and pleasure and I have made the foregoing devises and bequests, with this provision and limitation, that if it shall so happen that the said Joseph should decease, leaving no heirs of his body lawfully begotten, and the said Elisha, or any heirs by him the said Elisha begotten then alive, that in such case all the devises and bequests of real estate herein before made to the said Joseph, should be and remain to him the said Elisha, or such his said heirs; and in case the said Elisha should decease leaving no heirs of his body begotten, living the said Joseph or any heirs of his body lawfully begotten, in such case all the lands before herein devised to the said Elisha shall be and remain to the said Joseph, or such his said heirs;—but in case both the

said Elisha and Joseph should decease, leaving no heirs of either of their bodies begotten, then all the lands herein before given to them the said Joseph and Elisha and either of them shall be and remain to the children of my brother and sister, who shall then survive." CH. 129.
Art. 3.

The testator died seized August 18, 1751. On his death his widow and said Elisha and Joseph severally entered into their parts, &c. September 24, 1755, said Elisha died seized without ever having had any issue of his body; and Joseph entered into his part, &c.; the widow died seized March 2, 1781, and Joseph entered into her part, &c. In the year 1783, said Joseph being seized according to his title, at a Court of Common Pleas, holden at Northampton last Tuesday of August 1783, suffered a *common recovery* with single voucher duly executed of the lands, &c., in the declaration, "to his own use in fee simple," and entered "and became and was seized as the law required, of such estate therein as by law might or could pass to him by virtue of said will and the said common recovery;" and September 27, 1783, he made his will, recited the said lands had come to him &c., the recovery &c., Samuel Clark recoveror, and his deed to said Joseph Hawley, he devised said lands &c.; so included in the common recovery, except such parts as he had sold to the said inhabitants, "in their corporate capacity as a town," to them and their successors, &c. recommended schools, &c.; he died March 10, 1788, so seized without leaving issue of his body, his will was proved &c. After his death said inhabitants entered &c. claiming in fee simple, "and became and were seized of such an estate in the same, as by law could pass to them by the said will of the said Joseph," and they being so seized, said Moses entered before he sued, and ejected them and became seized of such an estate as by law passed to him after the deaths of said widow, Elisha, and Joseph, and the said inhabitants re-entered on him and ejected him, and become seized &c. Joseph Hawley, Samuel Hawley, Thomas Hawley, and Lydia Dwight were the brothers and sister of said Ebenezer the testator, and his brother Joseph was father of said Elisha and Joseph Hawley, said devisees, his only heirs; Moses Hawley the demandant, Dorothy Kellogg, and Lydia Moreton were children and only heirs of Samuel Hawley deceased;—and so finding the pedigrees of the other branches of the family.

This cause was argued in writing, and the devise of the said Ebenezer was held to be a devise to the said Elisha and Joseph in tail, with cross remainders in tail, and a contingent remainder to the children of the testator's brethren and sister living when these estates tail should be spent. Judgment for

Entries and deaths, &c.

Survivor suffered a common recovery to his own use in fee.

His devise to the said inhabitants as a corporation.

His death, his issue failed, inhabitants entered; entry on them, their re-entry, &c.

Judgment for the said inhabitants.

CH. 129. the said inhabitants ; the demandant and so the plts. in error,
 Art. 3. his children, contended that a fee simple was devised to said
 ~~~~~ Elisha and Joseph, determinable upon certain events which  
 happened, and that there was a proper *executory devise* to the  
 demandant, &c. limiting the estate to them on certain events,  
 the devisor parting with the whole fee simple ; and if an ex-  
 ecutory devise, it was not affected by the common recovery :  
 also, as heirs at law of said Ebenezer or of said Elisha. Re-  
 lied mainly on the devise. This no doubt had been such a  
 conditional fee in Elisha and Joseph, like *Pells v. Brown*, &c.  
 &c. if, for instance, the testator speaking of one of them dying  
 not leaving issue, living the other, if he had not added, or  
 “any heirs by him the said — begotten,” by adding in each  
 nephew’s case these words, clearly left the dying without heirs  
 of the body indefinite, and the estate of the one was not to  
 go over, as long as he had any issue alive, to the other ; taking  
 the case at once out of the rule laid down in *Pells v. Brown*,  
 and like cases, and giving the said Elisha and Joseph estates  
 in tail ; and as no estate was to go over while there was issue  
 of either, they necessarily had cross remainders. And the  
 children of the brethren and sister took a contingent remaind-  
 er, because it was to be to those of them “who shall then  
 survive ;” that is, at the time the estates in tail expired : and  
 this contingent estate resting on prior freeholds, was a remain-  
 der and not an executory devise, according to *Purefoy v.*  
*Roger*, and like cases. On the whole, there appears no great  
 difficulty in this case, there being fee simple estates, by the  
 first words, to said Elisha and Joseph, was but a common  
 case, in which by after words such estates have been repeat-  
 edly turned into estates tail. The very numerous cases cited  
 by the parties have already been mostly noticed in the pre-  
 ceding chapters or will be in future chapters, but upon many  
 other points besides those in this case.

Estates in  
 tail, the rea-  
 sons.

The conveyance of estates tail and our statutes on the sub-  
 ject were considered, Ch. 108, a. 5.

9 Mass. R.  
 161, Lithgow  
 v. Kavenagh.

§ 3. Action of *formedon* in the *descender*, on the gift of  
 James Noble, December 13, 1769, whereby he devised the  
 demanded premises to William Lithgow and Sarah his wife,  
 the demandant’s mother, and the heirs of her body lawfully  
 begotten forever ; testator died, said William and Sarah en-  
 tered, he died December 1, 1798, and she died November  
 1, 1807 ; demandant made title as her second son, her eldest  
 being dead before her, unmarried and without issue, so far  
 the declaration. Plea, not guilty. Verdict for the tenant &c.  
 The clause in Noble’s will was thus : “I give to Colonel Wil-  
 liam Lithgow and Sarah his wife, and the heirs of her body,  
 to be at the disposal of their father, William Lithgow Esq.,

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among his children as he shall think proper, the westerly side or half of the stream," &c. [describing the demanded premises] "on consideration that he the said William Lithgow or his heirs or assigns, pay my loving wife yearly during her natural life every first day of June, £20 lawful money. And in case I should sell the said estate, I order that the money I receive shall be paid to the said Lithgow to be disposed of among his children as aforesaid, he the said William Lithgow or his heirs giving my loving wife &c. security to pay her £20 yearly, as aforesaid." Tenant's title 1. The deed of William Lithgow, the father, made to the tenant February 9, 1795, in consideration of £1018, to convey to him the demanded premises in fee, with warranty against all persons claiming by, from, or under the grantor or Sarah, his wife, and against the heirs, claiming as such, of the late Major Noble, the deviser, or any other conveyance made by or under him. And in this deed Sarah Lithgow, the demandant's mother, is made a party by these words at the close, "I, the said William Lithgow, and Sarah, my wife, in token of her full, free, and entire relinquishment of all her right to said granted premises, set our hands and seals," &c.—executed in the presence of two subscribing witnesses, and acknowledged by both, February 24, 1795, and registered the next day. The tenant at the same time mortgaged the same to William Lithgow as security for part of the purchase money. 3. Sarah Lithgow and her son James N. Lithgow made their deed Nov. 18, 1799; in it they recite the before mentioned deeds, calling the first the deed of W. and S. Lithgow, and saying they granted and conveyed the premises to James Kavenagh, that he and Matthew Cottrill, originally concerned with Kavenagh in the purchase, had paid the mortgage sum, and to discharge the mortgage and vest the land in Kavenagh & Cottrill, the said Sarah and James N. Lithgow, also described as administrators of W. L., the father, deceased, and for the sum mentioned in the condition of the mortgage paid by Kavenagh & Cottrill, the said Sarah and James N. for themselves, and in their said capacities did grant, release, remise, and forever quitclaim to said Kavenagh & Cottrill, their heirs and assigns forever, all their, the grantors' and the said William Lithgow's right, title, interest, and estate in and to the premises. And there is a covenant by said Sarah and James N. for themselves, their heirs, executors, and administrators, and in their capacities as administrators, to warrant and defend the premises &c. against all persons lawfully claiming from, by, or under the grantors, or under William Lithgow deceased. Held, the last deed operated to confirm the intentions of the parties in the first: 2. That it effectually conveyed the premises to Kavenagh &

CH. 129. Cottrill in fee : 3. That it was sufficient according to the act of 1791, ch. 60, to bar the issue in tail, claiming under said Sarah, even if on the construction of the devise the first deed by her and her husband was not effectual to the same purpose. Though this decision at first view may be considered questionable, yet on examination it will be found to be correct and made on a liberal and fair construction of this statute of March 2, 1792, as well as to the consideration, as the seizin and possession of Mrs. Lithgow when she made this last deed of November 18, 1799, when she was a widow. On the whole, a full consideration had been paid her husband, and in a legal view to her also, and November 18, 1799, there was no adverse possession in a third person to prevent the operation of a deed in a common case as between parties situated, seized, and possessed, as she and her son James N., and Kavenagh and Cottrill then were ; and if a deed in a common case would have operated as if she had had a fee simple instead of a fee tail, it is but a liberal and just construction of the statute to allow her last deed to operate in this case to convey her fee tail. When this deed was made the whole seizin and possession of the land were in the parties to it, and they recognising the rights of each other according to former deeds and the will, and as of mortgagors and the administrators of the mortgagee.

9 Mass. R.  
514, Davis v.  
Hayden & al.

§ 4. *Entry sur disseizin.* A. D. 1765, John Vassall, seized in fee of the demanded premises, by indenture of two parts conveyed them to Thomas Oliver, as trustee to Vassall's sister, Ruth Davis, wife of Edward Davis, and to Oliver's heirs, to hold the same to him to the several uses, intents, and purposes expressed : 1. To the sole use of said Ruth for her life, remainder to said Edward Davis for his life, remainder to the use of the joint heirs of the body of the said Ruth and Edward by them lawfully begotten ; and touching her estate it was declared it was so limited to her in trust, that in case of the failure of said Edward in business or insolvency, it should not be liable for his debts. Davis and wife entered in 1765, and she died in 1776, and he occupied till he died, April 16, 1811 ; they had five daughters, some of them the tenants, and three sons, the demandant the oldest ; he counted and claimed in special tail ; but October 15, 1795, he gave a deed of his seventh part to his brother Edward, then thinking the remainder was to all the children. On these facts the court held : 1. That this was an estate in special fee tail in Davis and wife, and that their eldest son (the demandant) was entitled after their death to the exclusion of the other children : 2. Our court is inclined to construe an estate in trust to be an estate to uses, because " we have no court of

**chancery to compel the performance of trusts :** 3. If in this case there was a trust estate in Oliver it was determined by the death of Ruth Davis ; then a legal estate vested in said Edward for life, remainder to the joint heirs of &c. : 4. The demandant's said deed had no effect, for when he made it he " had nothing in the premises ; he was but heir apparent, and nothing passed by his deed." In fact there was no estate in trust, but to preserve the wife's life estate from the husband's debts, otherwise the conveyance was to uses and legal estates vested. So Shelley's case applied, and the objection made by the tenant's counsel to the application of it, because, as they said, the estate of Davis and wife was a trust estate, and the estate limited to the heirs was not an equitable but a legal estate, was not well founded. Had this objection been correct, and Davis and wife had had trust estates and their heirs a legal estate, then the estates could not have so united as to have constituted an estate in tail. As this deed clearly confined the estate to the heirs of the bodies of Edward and Ruth Davis, this material part of the gift could not be affected by any fair or legal construction of the word, *joint*, so as to give a fee simple, as the limitation was by a clear expression, and the word, *joint*, was of very doubtful meaning, if it had any meaning at all in the sentence.

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The four cases were decided mostly on common law principles, and can be useful only by making a full statement of them.

§ 5. A by will provided for his wife and charged his estate with the payment of his debts &c., then devised real and personal estate to his four sons and daughter E, and added, if any of his sons or his daughter should die without heirs males of their bodies, then the lands to return to the survivors to be equally divided between them. Held, no estate tail, but a remainder over in fee to the survivors, on failure of the male heirs of the one first dying ; on the principle the returning to the survivors meant at the death of the first.

1 Johns. R. 440, 461, Fosdick v. Cornell.—3 Atk. 396 ; many cases cited.

§ 6. The testator seized in fee of lands, devised them to A for his natural life, and if he left lawful issue then to such issue, but if A died without issue, or they died under twenty-one, then to B, his heirs and assigns, on condition to pay &c. Held, A had an estate in tail forfeited by his attainer.

1 Dallas, 47.

§ 7. A devise to the devisor's son W., and if he die without heir or issue then the land should fall into the possession of his brother R ; held, W. had an estate in tail. See also, words that give an estate tail, 1 Hen. & Mun. 240, Smith & al. v. Chapman ; 1 Dallas, 47, James' claim ; 2 Wash. 31. The testator devised lands to his son, James Garnett, during his natural life, remainder to his son Muscoe and his heirs, in trust, and for the use of the first and every other son of said James who should survive him in tail male, equally to be divided, but if his son James should die without issue male, then

2 Bin. 465, Willis' lessee, v. Bucher.—See Ch. 223, a. 11, s. 41. Roy v. Garnett.—Brewer v. Opie, 1 Call, 212.—Selden v. King, 2 Call, 72.

CH. 130. to Muscoe for his life, with like remainders to his surviving sons, and if he should die without male issue, then in trust for three grandsons of the testator with like limitations, remainder to Muscoe in fee; and he desired the widows of any of his sons and grandsons should have dower. James died, never having had male issue. Held, he took an estate for life only, with remainders to his surviving sons as tenants in common in tail male, remainder to himself in tail male; and that his life estate and remainder could not unite, because the estates were of different natures; the former being a legal estate, and the latter remaining an equitable one, not executed by the statute, for want of male issue of James coming in *esse*; equitable because James had a mere use not executed in tail male generally.

## CHAPTER CXXX.

### ESTATES FOR LIFE.

As to many life estates, see Ch. 125.  
2 Bl. Com. 120 to 125—  
6 Cruise, 298, 299.—10 Johns. R. 148.—Many good authorities, especially Doe v. Clarke.

#### ART. 1. *General principles.*

§ 1. Estates for life or freeholds not of inheritance, are conventional or created by the acts of the parties, or legal, created by operation of law. The conventional are for the life of the lessee, or for the life of another, were of a feudal nature, and conveyed by livery of seizin: and a grant to A without more words makes him tenant for his life; that is as large an estate as the words will bear. An estate granted to a woman during widowhood is a life estate, because it may continue for life. Estates for life after possibility of issue extinct have been already noticed; and estates by the curtesy and in dower are also estates for life, and will be considered in this chapter.

2 Call, 520, Morris v. Owen.

§ 2. The incidents to life estates, whether conventional or in law: 1. The tenant is entitled to *estovers*, the full use of the land and all temporary profits: 2. If the termination of his estate be contingent he shall have the emblements or profits of the crop: 3. The under tenant stands in the place of the tenant for life, and has the like advantages, and some think greater as to emblements. See Emblements.

**Freehold is such an estate in land as is conveyed by livery of seizin, the tenant thereof has the feudal possession or seizin in deed. He that has an estate for life has a freehold, but** **CR. 130. Art. 1.**

none that has a less estate. A freehold makes a man tenant to the *præcipe*. "At common law any estate of freehold in land might pass by livery of seizin, without deed, or lease for years of land was good, without either livery of seizin or deed." And livery of seizin must give a present freehold, or none at all, for it is of the essence of it to pass the estate at the moment it is made. But at common law there were some cases in which a freehold passed without livery of seizin, as by exchange, by devise, where allowed, by surrender, by release or by confirmation, to a lessee for years or at will, or by fine or by common recovery; but no freehold passed in deed or law before entry, therefore in exchange if either party died before entry, it was void. And when a freehold lay in grant or livery it could not cease by condition without entry or claim, nor could it arise without livery or delivery of the deed. It may merge in the inheritance. 1 Cruise, 80.

§ 3. An estate of freehold must be created to commence immediately, for no estate of freehold in land can be created to commence in *futuro*; but a freehold in an office or rent *de novo* may commence in *futuro*. But as a freehold passes by devise without corporeal tradition or livery of seizin (as it must if it pass at all) it may commence in *futuro*. While the freehold continues, the seizin is in the tenant of it. Watkins, 27.—Is subject to pay interest, but not principal. 1 Cruise, 90.

§ 4. No interest in a freehold can at common law be barred by any collateral satisfaction; as if A disseize B of black-acre and then convey to him white-acre in satisfaction, and B accept white-acre in satisfaction, yet he may enter on black-acre. *All my lands in* (or at) *A*, passes only an estate for life—descriptive only of locality.

§ 5. In this case a lease for lives was made Nov. 26, 1750, to commence from the day of the date thereof, and seizin was delivered by attorney to the plt's. lessor, May 28, 1751. The court held, this lease was valid. Lord C. J. Pratt said, we must not overthrow established law; that a freehold cannot be conveyed to pass in *futuro*, is a certain principle, and was grounded on the feudal law; for if a freehold could pass to commence in *futuro*, there would be an *abeyance* and want of a tenant against whom to bring the *præcipe*, and the law will not suffer the land to be in *abeyance* a single day, if possible to prevent it, for if it might be without a tenant of the freehold one day, why not one year or fifty years? Indeed at this day there is not such absolute necessity that there should be an actual tenant of the freehold, as formerly, when real actions

2 Bl. Com.  
104.—Wat-  
kins, 12, 198,  
131.—Co.  
Lit. 104, 266.  
—Co. Lit. 48.  
—Co. Lit.  
216.—2 Bl.  
Com. 314.—  
Co. Lit. 50.—  
Co. Lit. 51.—  
Co. Lit. 218.

2 Bl. Com.  
165.—Salk.  
466.—12  
Mod. 79.—  
2 Bl. Com.  
173.

4 Co. 1.

Dougl. 434,  
763.

2 Wils. 166,  
167, Free-  
man v. West.  
—4 Cruise,  
117.

CH. 130. were the only way to try titles to lands, and which real writs  
 Art. 1. can only be brought against tenants of the freehold, because  
 at this time and for 200 years past the fictitious action of ejectment is and has been the universal remedy for trying titles to lands and tenements; then this is a very strong case for avoiding as much as possible the *astutia* of the law. "The old principle of law, that a freehold cannot pass to commence in *futuro*, has no good reason or ground to stand upon at this day." But without saying any thing against that old law we may determine this is a good lease. Here the freehold remained in the lessor after the date and making of the lease, and until seizin was delivered by the attorney to the plt's. lessor; and then and not before the freehold passed. The livery of seizin is the only powerful operative transaction, for without livery nothing would have passed. The making the power of attorney to make livery of seizin shews it was to be after the date, and in the mean time the freehold was in the grantor. This old rule as to *futuro* does not hold in Connecticut. Reeve's D. R. 117. But statute law provides in that State, that a freehold estate may by deed commence in *futuro*. The law in Connecticut has placed deeds and wills in this respect on the same footing—and it deserves inquiry if the law be not so in several of the United States.

Co. Lit. 41. § 6. "If a lease be made to a man for his life, and the life of A and B, he has but a freehold with several limitations, which is higher than a lease for his own life;" and by our statute may be devised. "But when there are several estates in several persons, an estate for one's own life is higher than for another's."

Co. Lit. 42, 43. § 7. "Tenant for life may surrender to him in remainder for life, and if he enfeoff him it enures by way of surrender and is no forfeiture." And if A, tenant for his own life, lease to B for his life, A has a reversion in the eye of the law, because his estate is considered larger than B's. A may have a reversion to enjoy after B's life estate, but B can have none after A's.

Co. Lit. 42, 43. § 8. So a lease made during widowhood or to a lessee so long as he shall behave well, or pay £10 a year, or till he be promoted to a benefice, or for any other uncertain time, if it be of lands and livery of seizin be made, gives an estate for life determinable on a subsequent event. In each case the estate is vested and may continue for life, and therefore the law considers it a life estate till the event happens whereon it divests. And if it be of a thing lying in grant it gives an estate for life by the delivery of the deed.

Co. Lit. 42, 43. § 9. So if a farm worth £20 a year be leased to one till £100 be raised, and livery of seizin is made, he has an estate

for life determinable on levying the £100, for the reasons above. "But if a rent charge of £20 a year be granted till £100 be raised, the lessee has but a term for five years, because it is certain the money will be raised. Yet some uncertain estates are neither for life, years, nor at will, as where land is devised to executors till such debts are paid." So where one has land delivered in execution for debt. And if a lease be made by tenant in fee simple for life, it is construed for the life of the lessee, but if by tenant in tail, it is construed for his life. In the first case the rule may consistently apply, of construing a grant most strongly against the grantor; in this last case not; another rule applies, that is, a man shall be intended to grant no more than he has by construction; for here is room for the intentions of the parties to be considered, and it will not be presumed they intended more estate than the grantor had.

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§ 10. A devise to A for life, remainder to trustees to preserve &c., remainder to the heirs of A's body, is but for life, there being words of restriction that A shall not sell longer than for his life &c.; but this judgment in *Perrin v. Blake* was reversed in the Exchequer Chamber by the opinion of six judges against two. And 2 W. B. 1014; 1 Salk. 239; see 2 P. W. 47; 6 Cruise, 380 to 403.

1 W. Bl. 679,  
*Perrin v. Blake*.—2 W. Bl. 1215,  
*Doe v. Weston*.

§ 11. Devise to A and B of all his real and personal estate to be equally divided between them, or the survivors paying debts, and after their death to the male heir. A and B have only a conditional estate for life.

#### ART. 2. *English cases.*

§ 1. A devise to A for life, remainder to his first and other sons in tail male, remainder "to the use of all and every daughter or daughters of the body of B lawfully issuing, as tenants in common and not as joint tenants; and in default of such issue" to the use of the right heirs of the devisor; such issue is confined to daughters and they have only an estate for life. 4 Cruise, 504.

3 D. & E. 83,  
*Hay v. Earl of Coventry*.  
—*Fearne's*  
Ex. Dec. 325.

§ 2. If an estate *per auter vie* be limited to a man, his heirs, executors, administrators, or assigns, and be not devised, it goes to the heir as a special occupant. But see Mass. Act, March 5, 1806; 7 Ves. jun. 425.

4 D. & E. 229, *Atkinson, adm. v. Baker*.

§ 3. So if there be a devise or conveyance to A for life, remainder to his next heir male, and to the heirs males of the body of such heir male, there is only a life estate in A, and a contingent remainder to his heir as a purchaser, which vests the instant the life estate of A ends. Heir in the singular number is a word of purchase, and not of limitation.

4 D. & E. 294, *Doe v. Colles*.—6 Cruise, 368.  
—5 Bac. Abr. 351.

§ 4. C. J. Phipps, Lord Mulgrave, being seized in fee of the premises demanded, and having only one daughter and

5 D. & E. 320, 325,  
*Doe v. Lord Mulgrave*.—6 Cruise, 313, 314.

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three brothers, of whom the present deft., then and still unmarried, was the eldest, the lessor of the plt. the second, also not married, and A. P. then married, but without issue, the third, October 8, 1792, devised his estates real and personal, "in trust to T., Lord Longford, &c. &c. for my first and every other son in tail male; failure of issue, to my brother Henry and his first and every other son in tail male, and failure of such issue, to my brother Edmund, and his first and every other son in tail male; failure of such issue, to my brother Augustus and his first and every other son in tail male; failure of such issue, to my daughter, A. E. C. Phipps, and her first and every other son in tail male, and in failure of such issue, to her eldest daughter, and her first and every other son in tail male; failure of such issue, to the daughters of the last surviving Lord Mulgrave; and in all the foregoing cases the devises were without impeachment of waste, other than wilful waste. Contended that the first devise &c. Lord Mulgrave only took an estate for life, with remainder in tail to his issue.

Lord Kenyon C. J. the words, "*first and every other son*," "*children*," or "*heir*," may be taken as words of purchase, when it is necessary to give them that construction in order to effectuate the intention of the devisor, as in *Robinson v. Robinson*. Hence the present Lord Mulgrave took only a life estate, and as the recovery was a forfeiture, the next brother, the lessor of the plt., must recover. Willes, 650; Dougl. 337, 761.

5 D. & E.  
558, *Denn v.*  
Millor.—6 D.  
& E. 175.—  
1 Bos. & P.  
557.—2 Bos.  
& P. 246.—  
2 Atk. 24.

§ 5. One devised "all the rest of his lands, tenements, and hereditaments, either freehold or leasehold, also all his goods &c., after payment of his just debts and funeral charges." Held, the devisee has only an estate for life; for the word, *hereditaments*, does not give a fee, and the charge of payment of debts &c. is usually out of the personal estate, and is not naturally referrible to the real estate. 2 W. Bl. 1215; 2 Stra. 849. Affirmed after a reversal of a reversal. 3 Maule & Sel. 516; 6 Cruise, 316, 318.

Cowp. 657,  
*Deen v. Gas-*  
kin; cited 6  
Cruise, 309.

§ 6. This was ejectment. Jonathan Gaskin seized &c. March 30, 1736, as to all his worldly estate &c., devised all his freehold messuages and tenements in G. with all houses &c. to A, B, C, and D, equally to them, his sister's sons, and ten shillings to his heir at law. Held, the devisees are tenants in common, and take an estate for life only. And

9 Johns. R.  
222.—Fell v.  
Fell,  
3 Wils. 399.

§ 7. Lord Mansfield said, if there be no words of limitation it is a rule of law in a will as well as in a deed, that the devisee has only an estate for life; but any words in a will tantamount, as "in fee simple," "all my estate," may carry a fee; but here are no words to carry a fee or to controul the

rule of law; the words, "*as to all my worldly estate*," are not connected with the devise in question.

§ 8. C. Blackett having freehold and leasehold estates, had leased them without distinction, and August 24, 1738, devised them and all his estate and interest therein to his wife, for and during her natural life, and made A and B her trustees, and after her death to her two sisters in law, as tenants in common; but if his mother disturbed his wife in her possession, then to his kinsman, W. Blackett, his heirs and assigns forever; and charged his estates with the payment of his debts and funeral charges, to be paid out of the quarterly profits of the said estates by his wife; and he gave her all his personal estate and made her sole executrix. August 27, 1738, the testator died without issue, and leaving the father of the deft. heir at law.

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Cowp. 285,  
Roe v. Black-  
ett.—6  
Cruise, 308.  
—Dougl. 761.

§ 9. The court held, the two sisters in law took only a life estate, after two arguments, and said there are no words of limitation added to the devise, therefore it is only an estate for life, unless on the whole will it appears the testator meant a fee. Here the debts are to be paid out of the yearly profits by the wife only thirty-four years old. The words, "*all my estate and interest therein*," precede the life estate to the wife, and so have no meaning, and are left out in the devise to the two sisters.

§ 10. A seized in fee, surrendered C lands to B whom he intended to marry, and the heirs of their two bodies lawfully begotten, and for default of such issue to the use of the right heirs of the said A. The court held, B took an estate for life with contingent remainder to the heirs of the two bodies, &c.

3 Wils. 144,  
Throgmorton v. Wharrey.

§ 11. A devised to his oldest son for life, and if he died without issue living at the time of his decease, then to his second son and his heirs; but if his eldest son hath issue living at his death, then the fee simple shall remain to his right heirs forever. Held, this was only an estate for life in the eldest son, which was not drowned in the reversion he hath as heir, and that the remainder to his right heirs is not executed but contingent. Goodwin v. Taylor.

3 Salk. 128.  
Hill v. Burrow, 3 Call,  
362.—2  
Wash. 74.

§ 12. It was laid down in this case as a general rule, that the general intent of the testator must prevail against his particular intent. Therefore, a devise to A for life, without impeachment of waste, remainder to his eldest son and the heirs of such eldest son, and in default of issue male of A then to B; A takes an estate for life, remainder to his elder son in tail, and remainder to A in tail (male.) Fate v. Tally, 3 Call, 342, 354; 2 Call, 316; Dunn v. Bray, 1 Call, 338.

8 D. & E. 5,  
Doe v. Halley.  
Eldridge &  
al. v. Fisher,  
1 Hen. & M.  
569.

§ 13. A. B. devised, "as to what real and personal estate it has pleased God to bless me with, (all my debts &c. being

8 D. & E.  
497, Doe v.  
Allen.

CH. 130. first paid out of my personal estate, and if that be not sufficient out of my real estate,) I give and dispose of the same as follows: I devise all my messuages, lands, tenements, and hereditaments in S. &c. to W. Allen;"—he took only a life estate. The introductory words do not of themselves give a fee, the charge on the real estate is contingent; and *hereditament* is not so strong a term as *tenement*. 8 D. & E. 147. Parol evidence to set aside a will obtained by fraud. Only a life estate if payable only for the devisee's life. 6 Cruise, 320.

See Ch. 128,  
a. 2, s. 1.

Andrews,  
210, Rogers  
v. Briggs.

§ 14. The word, *estate*, when descriptive, only gives a life estate. As where Charles Hutton seized in fee of lands, and having three brothers, Richard, Matthew, and Thomas, April 1, 1692, devised all my lands, houses, rents, and profits, (to remain to himself for life) to his wife for life, "remainder to our issue in tail; and in default of such issue, then I will that my said lands shall go to my two brothers, Richard and Matthew, to be divided between them; and if my brother Richard shall have no issue male to inherit his part, then my whole lands and estate shall go to my brother Matthew in tail male, he paying in consideration thereof £200 to the daughter or daughters of my brother Richard, and £200 to the daughter or daughters of my brother Matthew (if they have any) within one year after the same estate shall fall to him; and if he the said Matthew shall have no issue male, then my lands shall go to my nephew, Thomas Hutton, and his heirs, he paying" £200, and £200 as above; and if he "shall have no issue male, then my said estate shall go to the daughter or daughters of my brother Richard, and to the daughter or daughters of my brother Matthew," and if they had none, then to those of said nephew, and if he had none then to the testator's right heirs. The court held, that the words, *said estate*, gave but a life estate to the daughters of Richard and Matthew; for the word, *estate*, is plainly "used as descriptive only, synonymous with *lands* in this will; and clear it is that the words, *lands and estate*, as applied to Matthew, meant no more than the word, *lands*, alone, when applied to the nephew, and *said estate* referred back &c.

Goodright v.  
Dunham.

§ 15. In this case stated before, Ch. 125, a. 5, it was adjudged a devise to A for life, and after his decease &c. he had but a life estate.

3 D. & E.  
484, Doe v.  
Perryn;  
cited 2  
Cruise, 283.  
Webb v.  
Webb, 2  
Vern. 668,  
Warman v.  
Seaman & al.  
Finch's R. 282.

§ 16. This case cited in part, Ch. 114, a. 20, to shew how an estate opens, may now be cited to shew what words constitute a life estate. This was a "devise to Dorothy Comberbach for life, remainder to all and every the children of the said Dorothy Comberbach begotten, or to be begotten of her body by James Comberbach, and their heirs forever, to be equally divided between and among such children (if more

than one) share and share alike, but if only one, to that one and his or her heirs forever, and in default of such issue," over. Dorothy Comberbach had no issue when the testator died, but in 1739 had a daughter who died in June 1740, &c. Buller J. said, in this case *children* and *issue* in their natural sense have the same meaning; but not so the word, *heirs*. "The words, *dying without issue*," have been frequently held to mean, "without issue at the time of the death of the party, in cases of *personal* property, but not in limitations of freehold estates." Here the estate vested on the birth of a child, without waiting for the death of the parents, and opened to let in those after born, "but if this were held not to vest till the death of the parents, this inconvenience would follow, that it would not go to the grandchildren; for if a child were born who died in the life time of the parents, leaving issue, such grandchild could not take," which could not be the intent. In this case D. Comberbach had but an estate for life, and contingent remainders in fee limited to her children. No notice was taken of the words, *equally dividing*, &c. among the said children, and as the fee vested in them, the remainders over were void though they died.

This was a devise to Marthana Legge, "during her natural life; and after her decease to the children of her body begotten and their heirs, and in default thereof to William Legge, the son of the testator. Lord Chancellor held, that Marthana took only an estate for life, "for when an estate for life is expressly given, no greater estate shall arise by implication, subsequent words of contingency enlarging the estate only where no express estate for life is devised," (but see *Robinson v. Robinson*, and *Doe v. Cooper*, Ch. 129, a. 2.) And held also, William Legge took immediately a vested remainder; as to children *their heirs* must mean *heirs* of their bodies, for they could not die without heirs while their uncle William Legge was living. And the children took by purchase, as stated in a former chapter. *Carter v. Tyler*, 1 Call, 185.

§ 17. Other cases on this head, see *Doe v. Collins*, *Lodgington v. Kyme*, Ch. 125, a. 5, *Doe v. Burnsel*; *Backhouse v. Wells*, *Archer's case*, *Long v. Laming*.

"Devise to A for life, remainder to the first son of A in tail male, and so on to the tenth son in tail male, and if A died without issue male of his body, the remainder over." By codicil the testator recited he had given an estate tail to A &c., said he therefore had an estate tail, for he might have more than ten sons. But the court held, that A had but an estate for life, "for where a particular estate is expressly devised, we will not by any subsequent clause collect by implication a contrary intent, inconsistent with the first." There is a

CH. 130.  
Art. 2.

3 D. & E.  
488, *Ives v.*  
*Legge*.—  
2 Cruise, 283.  
—*Fearne*,  
286.—*Good-*  
*wyn v. Good-*  
*wyn*, 1 Ves.  
226.

*Salk*, 236,  
*Popham v.*  
*Banfield*.

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2 Com. D.  
571, Good-  
wyn v. Good-  
wyn.

Law of Uses,  
25.

Pow. on  
Con. 39.

Willes, 592,  
596, Good-  
title v. Wood-  
hull & al.;  
cited 6  
Cruise, 300.  
—1 Burr. 45.

1 East, 264,  
Goodtitle v.  
Herring.—  
Many cases  
cited 6  
Cruise, 347.

Seaward v.  
Willock.

7 D & E.  
635, Goodti-  
tle v. Ed-  
wards.

great difference between a devise to A, and if he die without issue, then to B, and a devise to A for life, and if he die without issue, then to B. But this case seems to be much shaken by subsequent cases, especially *Robinson v. Robinson*, &c. in which it has been several times decided, that a particular intent, however expressed, shall give way to effectuate the general intention of the testator. But *quære*, if not express.

§ 18. This was a devise of lands to A for life, then to her children, equally to be divided, and for want of children to the testator's right heirs. Held, the children took as tenants in common for their lives only, and each is entitled to a share of the profits from the death of the mother, though not born when the will was made, and their estates vest as they come in *esse*.

This was a devise to B for life, and after his death "to the heirs male of the body of B, now living. This is a remainder vested in the heirs of B, and he has but an estate for life. The estate for the life of another is by the English law entailable, and so by our law as it may be granted or devised, and as it may continue beyond the life of the first donee.

§ 19. Devise to A for life, and then to his male children for their lives, and so to the male children descending from them on their decease or failure, then to B and the heirs male of his body for the same term for life, and upon the same terms meant for A and his male children on their failing &c. to C in like manner. Held, A had a life estate only; and on his death without issue B had only a like estate &c.

§ 20. A devise to A for life, without impeachment of waste, remainder to trustees to preserve contingent remainders, remainder to the heirs male of the body of A to be begotten, severally, successively, and in remainder one after another, according to seniority &c., the elder of such sons and the male heirs of his body being always preferred before the younger of such son or sons and the heirs male of their bodies, and in default of such issue to the daughter and daughters of the body of A as tenants in common, in tail, remainder over. Held, A had but an estate for life, and that the words, *heirs male of her body*, were explained by the subsequent words to mean first and other son. The testator explained and said, "by heirs lawfully to be begotten I mean first and other sons successively" &c. of the first taker. Hence the sons took by purchase and *descriptio personarum*; and 5 East, 193, life estate to the first taker and an attempt to create a succession of life estates to persons not in *esse*, which the law will not allow. Willes, 164; 6 Cruise, 161.

§ 21. The testator devised two houses to his wife for her life, and willed that on payment of a sum of money to her by his

son B, he should share equally alike with his other brothers and sisters, C, D, and E, and if any of his children died, his or her share to be among the survivors. Held, the four children had only estates for life. *Denn v. Page*, 3 D. & E. 87; cited in *Hay v. Coventry*, above. CH. 130.  
Art. 2.

§ 22. William Phillips devised to Adam Aldridge, preacher at the meeting-house of L—— for life, on condition that he should convey the premises to trustees to take place after Aldridge's death, for the use and support of the word of God at the meeting-house forever, and if that preaching should not be continued, then over to a charity school. Held, Aldridge had an estate for life, though the devise over after his death would be void by 9 Geo. II. c. 36. And 6 East, 328, 332, *Doe v. Copestake*. 4 D. & E.  
264, *Doe v.*  
*Aldridge*.

§ 23. The testator devised his estate to his wife during her widowhood, and for settling his temporal estate &c., and after to fall to his children, and required his three sons as soon as they came into possession to pay his three daughters £35 each, out of his last estate, and to each as she should come of age, and if any of his children died before twenty-one, their part to be divided among the rest; two of the sons died minors, and one daughter afterwards died without issue, third son also died leaving issue. Held 1. The wife took an estate for life with a vested remainder in fee in the sons: 2. Devise over to the surviving children was good executory devise: 3. The word, *children*, included daughters as well as sons: 4. The word, *estate*, in a will may pass a fee: 5. If land be devised to A with directions to pay B a sum in gross out of it, the devisee takes an estate in fee without any other words, though the sum paid be not a year's rent of the land, and though the payment be postponed. This was understood a charge on the sons in respect of the estate, see the principle above, Ch. 128, a. 3, s. 26, though expressed to be a charge payable out of the land. The executory devise took effect at the expiration of the life in being. 6 Johns. R  
185, 194,  
*Jackson v.*  
*Merrill*; many cases  
cited.

§ 24. The testator had the usual introduction as to his wordly estate, and devised: 1. "To his son J. B. a house and plantation where the testator" lived &c., in fee, he paying &c.: 2. To his wife a certain lot of land, also a third of such moveable estate as should remain after paying his debts, funeral expenses, and legacies, to be in lieu of dower: 3. He bequeathed some legacies, and then directed his house and land by the mill, to be sold by his executors. Held, the wife had but an estate for life, in the lot devised to her. In this case she was not charged with any payment on account of her lot of land. 4 Dall. 226,  
*Bushby v.*  
*Bushby*.

CH. 130. § 25. But if *contingent* whether the legatee will be charge-  
 Art. 2. able with the payment of legacies, he may not have a fee &c.

As where the testator, after the usual introduction, as to disposing of all his wordly estate, devised the same &c. : 1. £40 to his eldest son Jeremiah, "to be levied out of his estate;" £40 &c. to his son Jacob; \$5 &c. to his daughter E.; to his youngest son, James, a certain lot of land &c.; to his son Henry, a certain lot of land the testator then possessed, with the farming utensils, &c.; and added, all these legacies before mentioned to be paid May 1, 1805, "and to be raised and levied out of my estate;" and appointed Henry and another executors. Held, Henry had but an estate for life, as it was uncertain whether the devisee would be chargeable with paying said legacies. 6 D. & E. 610; 3 Burr. 1623; 6 Johns. R. 185; 8 D. & E. 497; Cowp. 657.

8 Johns. R.  
 109, Jackson  
 v. Harris—5  
 D. & E. 13,  
 668.—6 D. &  
 E. 175, 610.  
 —9 Johns. R.  
 104.—6 D. &  
 E. 671.—11  
 East, 220.—  
 Cowp. 352.  
 —3 Wils. 143,  
 414.

2 Dougl. 761, § 26. In this case there were like introductory words; and the testator devised his house to his son Samuel Russell, and after his death then to the two sons of Samuel, Thomas and William, and then at last gave 1s. to the husband of his heir at law. Held, Thomas and William took only estates for life, and that the reversion descended. And so it descends, where after a life introduction the testator gives all his real estate to his wife for life, and after her death to his son, Paul Cardale, "all that my land lying in the parish of" ———, into three parts to be divided, immediately after his wife's death, and among his grandchildren, including his heir at law, 5s. each. Held, Paul only had a life estate in said parish, and the reversion descended to the heir at law.

2 Dougl. 761,  
 Right & al. v.  
 Russell.—6  
 Cruise, 761.

And Doe v.  
 Collis.

2 W. Bl. 1014, § 27. Henry Saunders devised to Cole, Lowe, and their heirs, his estate at Tenbury, *in trust*, to receive the rents and profits during the lives of his four daughters, and the survivor of them; and afterwards "to pay such rents and profits to and among such survivor, and the child and children of such my daughters who shall first happen to die; and from and immediately after the decease of the survivor of my said four daughters, then my will is that they do sell the premises and pay the monies arising therefrom, in four equal parts, to and among the several children of my said respective four daughters, share and share alike." In a subsequent clause he bequeathed the residue of his goods and chattels among all his children equally, except his daughter Hester, "who is only to receive in full satisfaction of what is before bequeathed her, 3s. per week during her life, or until her distributory share be exhausted, out of my estate at Tenbury and personal effects, for her sole and separate use, exclusive of her husband." Held, the rents and profits should be divided among the four daughters immediately, they being all living. Objected, the

2 W. Bl. 1014,  
 Saunders v.  
 Lowe.

rents and profits must accumulate until three of the daughters were dead, and then be divided among the survivor and the children of those who were dead, according to the very words of the will; but the court held further, the testator never meant to leave all his daughters without any provision, till three of them were dead, "and then capriciously leave it to chance, which of them should survive, and share the accumulated profits," and especially as the testator had shewn he considered his daughter Hester entitled to a distributory share of his estate at Tenbury during her life. In this case the court departed from the words of the will, though in themselves plain, to effectuate the intent, or rather what the court thought ought to be, and must on the whole be, the intentions of the testator.

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§ 28. Devise to wife during her natural life, "and also at her disposal afterwards to leave it to whom she pleased. "Held, this only gave her a power to leave it by will, and hence a disposition of it by feoffment in her life time was void." She was confined to a disposition to take place after her decease.

10 East, 438,  
Doe v. Thor-  
ley.

§ 29. Limitation of an estate to A for life, and from and after the expiration of the term to her son and son's daughter and daughters equally to be divided, and on default of such son &c. then over. Held, the sons and daughters had but estates for life,

Loff, 221,  
Goodright v.  
Patch.

§ 30. Devise to trustees in trust that A and B have the profits equally between them, they are tenants in common. But a devise in trust for A and B, during A's life, as such tenants with an immediate remainder in trust for the heirs of B's body; B takes an interest *pur autre vie*; and if she die before A and without issue, this interest goes to B's personal representative.

1 Ld. Raym.  
751, Phillips  
v. Phillips.

§ 31. A devise to two sisters for life, is but an estate for life, though there be the words in the will, if they shall die *without issue, and their issue die without issue or issues*. So decided in the Kings Bench, and so held by nine judges against three in the House of Lords; but there however reversed by ten lords to seven.

2 Stra. 798,  
Shaw v.  
Weigh.

§ 32. One devises lands to A for life, and if he die without issue then B should have the lands. Held, A by express words has but an estate for life, and therefore shall have no greater estate by implication against the express words; but those words, *if he die without issue*, are only a condition on the happening or not happening whereof the remainder to B to vest or not vest; and being used only for that purpose seem to be confined to his having no issue at the time of his death; and then, in the mean time, the fee descends to the heir at law.

5 Bac. Abr.  
Am. ed. 785,  
Remainders  
&c., letter D,  
cites 9 H. VI.  
74.—2 Roll.  
R. 217.—  
Palm. 134.

CH 130.

Art. 2.

2 Fearne E.  
D. 310, Low  
v. Burron.—1  
Cruise, 89, 92.

§ 33. An estate *pur autre vie* may be devised in tail, and remainder over. As where J. C. was seized of an estate for three lives, devised it to his daughter M for life, remainder to her issue male, and for want thereof remainder to L. Held, remainder to L was good; but it was no estate tail in M and her issue, for every estate tail must be of inheritance to which dower is incident; but none in an estate *pur autre vie*, so limited to one and the heirs of his body; nor within the statute *de donis*, but only a descendible freehold. The devise to L was only a description who should take as special occupant during the life of *cestui que vie*, after M was dead without issue. But it seems that L's remainder may be barred by deed, or surrender, or other conveyance, without a common recovery by such tenant in tail. Grafton, Duke of, v. Hammer, Fearne E. D. 311, 312, cites 3 P. W. 266; and Baker v. Bayley, Fearne E. D. 312, 313, cites 2 Vern. 225. But in Low v. Burron, such conveyance was doubted. But Fearne E. D. 317, now settled, that where leases *pur autre vie*, are limited to one in tail, he may by lease and release, or any other conveyance proper for passing estates of freehold, bar his own issue and all remainders over, and makes a complete disposition of the whole estate. And 6 D. & E. 292, Grey v. Manock. Lord Northington considered, that the person who would be tenant in tail of such an estate, if it were an inheritance, is entitled to the actual ownership. 2 Fearne, 319, 320, 321. But such an estate *pur autre vie* may be limited to the first taker &c. for life, and then he can dispose of no more than his own interest.

Saville's R.  
75, case of  
Lovell.—  
Fearne E. D.  
325.

§ 34. Devise by A to B, his son, to him and to the eldest issue male of his body issuing, and for want of such heir male of his body, remainder to C, son of A, and the heirs male of his body, lawfully issuing. A died, B then having no issue male. After A's death B entered, and had issue, D, the deft., his eldest son. B died, and D entered by force of the will. Held, no estate tail was created by the words, *eldest issue of his*, B's, *body*, nor any way implied from the limitation in remainder over, for default of issue; also the eldest son took but an estate for life, and so the plt. recovered against D in waste.

6 Cruise, 301.  
—3 Leon. 71.  
—4 Leon. 41.  
—See Ch.  
128, a. 4, s. 12.

§ 35. Though a devise to one generally, with a power to give and dispose of the estate devised as he pleases, creates an estate in fee simple; yet where an estate is expressly devised to one for life, with a power of disposal, the devisee only has an estate for life, with a naked power to give the reversion.

Cro. El. 52,  
Pettywood v.  
Cook.

§ 36. *Survivors have life estates after estates in tail &c.* As where A seized of three houses, devised them to his wife

for life, the remainder of one to his son R and his heirs, of another to his daughter C and her heirs, and of the third to his daughter J and her heirs; and if any of them died without issue then the survivors to enjoy the whole of that part, equally divided between them. Held, the survivor took only a life estate. C married, died, and left issue, the plt. R died without issue, and the wife died. J, the survivor, entered into R's part, married, left the def., her son. Held, J had but a life estate in R's part. See also only a life estate in remainder to survivors after estates in tail, &c. 2 Vern. 388, Woodward v. Glassbrook; also 2 Wils. 80, Roe v. Holms.

CH. 130.  
Art. 3.

See also Cro.  
Car. 368,  
Spirt v.  
Bence.—6  
Cruise, 306,  
307.

§ 37. No use results on the grant of an estate for life, he has the *usu fruit* of the estate. 1 Cruise, 59; is entitled to estovers, 62; and has an interest in the trees, 64; and may sue his lessor for cutting them down, 64; but cannot commit waste, 69. See Waste cases, Emblements, Repairs, &c.

§ 38. *Noscitur a Sociis*. If A devise all his estate, real and personal, and the real be actually mingled with personal, the devisee has but an estate for life, as the maxim applies, and the real is governed by its association.

3 Cranch,  
134, Lam-  
bert's lessee  
v. Paine.

#### ART. 3. *By the curtesy*.

§ 1. Tenant by the curtesy is where a man marries a woman seized of an estate of inheritance, and has issue born of her body alive, which might possibly inherit as her heir such estate, and she dies, he shall hold it for his life. "The wife must be actually seized, but if actual seizin cannot be had, seizin in law will be sufficient;" as if she die before the rent become due; but not if she die before her husband can enter on the land. There can be no tenant by the curtesy of a right; nor of a seizin in law; nor of a reversion or a remainder on a freehold. And it is laid down as a general rule, that the husband shall have all the inheritance of his wife, whereof he was seized in deed, in her right, during the marriage, in fee, or in fee tail, for term of his life if he have any child by her. This estate does not require entry.

2 Bl. Com.  
161.—Co.Lit.  
28.—1 Cruise,  
107, 111, 112,  
113.—Doct.  
& Student,  
146.—Wat-  
kins, 36, 111.  
—1 Cruise,  
56, 115, 116,  
117, 120, 494.  
—4 Com. D.  
38.—1  
Cruise, 124.

§ 2. This act provided, "that when a man and his wife shall be seized of lands, tenements, or hereditaments, in her right, in fee, and issue shall be born alive of the body of such wife, that may inherit the same, and such wife shall die, the husband shall have and hold such estate during his natural life, as tenant by the curtesy."

Mass. Act,  
March 9,  
1784.

§ 3. In this act it is provided, that where there shall be no kindred of the intestate, the estate shall *escheat* to the Commonwealth for want of heirs, "saving always to the intestate's husband his tenancy by the curtesy, and his widow her dower at the common law." We have not, nor have had, any other statute law on this subject but this here cited. And it will be

Mass. Act,  
March 12,  
1806, s. 1.—  
Maine Act,  
ch. 33, s. 18.

CH. 130. observed, that the act of March 9, 1784, extended *curtesy*  
 Art. 3. only to estates in fee ; but as this act was affirmative, it did  
 not repeal the common law on the subject, by which husbands  
 here had always been tenants by the *curtesy*, by the rules of  
 of the English law. And so, it will be observed, is the provision  
 in our statute of March 12, 1806. So that on the whole our statute merely provides the husband shall be tenant  
 by the *curtesy* ; but when and how must be ascertained by  
 the common law ; and so has been our invariable practice.  
 And by that law, " one cannot have a right, title, use, reversion,  
 or remainder, expectant on a freehold, as tenant by the  
*curtesy*, or *dower*," and the issue must be born alive, and also  
 in the mother's life time, must have human shape, but need  
 not be alive when the estate comes to the wife.

Co. Lit. 29.—  
 2 Bl. Com.  
 127.

Co. Lit. 29,  
 30.—1 Cruise,  
 107, &c.

§ 4. There are four requisites to form a tenancy by the  
*curtesy* : 1. Legal marriage : 2. Actual seizin or possession  
 of the land by the wife, not a bare right to possess, which is a  
 seizin in law, or as of a reversion or remainder : 3. The issue  
 must be born alive in the life time of the mother, and capable  
 to inherit the land : 4. The death of the mother.

2 Bl. Com.  
 178.—1  
 Cruise, 125.

§ 5. The issue must be born during the coverture, but may  
 be before or after the wife's seizin, or living or dead at the  
 time of her seizin. This estate is subject to her charges, and  
 payment of interest.

8 Co. 67,  
 72, Paine's  
 case.

§ 6. In this case the court resolved, " that, at common law,  
 that if lands had been given to a woman, and the heirs of her  
 body, and she had taken a husband, and had issue, and the issue  
 died, and the wife also died without issue, whereby the inheritance  
 of the land did revert to the donor, in that case, the estate of the  
 wife is determined, and yet the husband shall be tenant by the  
*curtesy* ; for that is tacitly implied in the gift. They must have  
 issue born alive, of which being heard to cry is evidence, and must  
 be such as by possibility may inherit ; and though the issue must be  
 born alive, in the mother's life time, yet it may die before the land  
 descends to her. Not lost by the death of the issue. 1 Cruise, 119.

Co. Lit. 31.

§ 7. There have been doubts in England if the husband can be  
 tenant by the *curtesy* if his wife be an idiot ; but in this State it  
 seems there can be no doubt of this sort, for the fee and freehold is  
 in her, as in any other person, and even in England the wife of an  
 idiot has dower, according to Coke, though Blackstone thinks not.  
 But there may be a question if an *idiot* can marry.

2 Bl. Com.  
 127.

Co. Lit. 31,  
 32.

§ 8. If tenant by *curtesy* initiate, (that is, having issue born,) make  
 a feoffment, the feoffee shall hold during his life ; but if he  
 enfeoff on condition, and enter for condition broken, and the wife  
 die, he shall not be tenant by the *curtesy*, for his

title to the tenancy by the *curtesy* was extinguished by feoffment.

CH. 130.  
Art. 3.

§ 9. In this case it was held, that the husband may be tenant by the *curtesy* of a trust, though a wife cannot have dower thereof. Is forfeitable by alienation, 1 Cruise, 125; not for adultery, Id.

3 P. W. 229,  
Chaplin v.  
Chaplin.

§ 10. A woman was seized in fee, and mortgaged her estate, married, had issue, and died before redemption, and it was held the husband should be tenant by the *curtesy* of the mortgaged premises, for the land in equity is considered only as a pledge for the money, and does not alter the mortgagor's possession.

1 Atk. 603.

2 Eq. Abr.  
728, 729,  
same case.

§ 11. A woman, by articles, before marriage granted to her intended husband during her life, the interest of her money and the rents of her estates, to maintain the house &c.; this did not abridge his legal rights; but he was entitled to be tenant by the *curtesy*, in her estate at the marriage, and in what came to her afterwards.

3 Atk. 469.  
Steadman v.  
Palling.

§ 12. The estate must be such as the issue may inherit, and therefore if a woman has an estate to her and the heirs males of her body, and she has issue, a daughter, her husband shall not be tenant by the *curtesy*. And so if a woman, tenant in tail, makes a discontinuance and takes back an estate in fee, and then takes husband, has issue, and dies, he shall not be tenant by the *curtesy*, for she never was seized of the estate tail during the coverture.

4 Com. D. 40.  
This estate  
may be of  
money to be  
vested in  
lands, 1  
Cruise, 120,  
121.

§ 13. And if her estate end with her life, by express provision, or limitation, or condition, though she have a fee by a subsequent remainder, or by descent, her husband shall not be tenant by the *curtesy*. As if an estate be limited to the wife for life, and afterwards to the first, second, and other sons in tail, remainder to the right heirs of the body of the wife, remainder to her in fee, her husband shall not have it by *curtesy*.

4 Com. D. 40.

§ 14. In this case a father, by his will, directed trustees to convey a fourth part of his freehold lands to the use of his daughter P, for her natural life, so as she alone should take the rents, and so that her husband should not intermeddle therewith, and after her death for the heirs of her body in fee. Her husband was not tenant by the *curtesy*, it being only an executory trust, and she took only an estate for life. Common, rents, certain offices, and executory devises liable to it. 1 Cruise, 121, &c.

1 Atk. 607,  
Roberts v.  
Dixwell.

§ 15. Lands were devised to A, and her heirs, and if she died before her husband, he to have £20 a year for life, the remainder to go to her children,—the husband is not tenant by the *curtesy*.

2 Atk. 47,  
Sumner v.  
Partridge.

CH. 130.  
Art. 3.

3 Atk. 695,  
Hearle v.  
Greenbank.

§ 16. So if a man gives his real estate to trustees, to permit his daughter to take the rent and profits, and to dispose of them to her separate use notwithstanding her coverture, her husband is not tenant by the *curtesy*. In this case the estate continues in the trustees, in trust, and the wife is not seized of any estate.

So if lands be devised to a woman for her life, with a contingent remainder to her issue, by which the fee descends in the mean time to her, as heir at law to the testator, her husband shall not be tenant by the *curtesy*; nor in any other case where the issue cannot inherit the estate as descended from her.

3 Bac. Abr.  
662, 663.

§ 17. The words of the law, *aliquam hereditatem habentem*, require the wife have actual seizin of all things lying in livery, and if the land descend to her during the coverture, she has not actual seizin or possession, till the entry of her husband is made. Otherwise of things lying in grant.

2 Bos. & P.  
662, Buck-  
worth v. Thir-  
kell.—6 D. &  
E. 679.

§ 18. An estate was devised to trustees and their heirs, till A, a female infant, should attain twenty-one, or marry; and upon her attaining twenty-one or marrying, to A and her heirs; and in case she died under twenty-one without leaving issue, remainder over; she married and had a child, which child died; and then A died under twenty-one. Held, her husband was entitled to be tenant by the *curtesy*. Lord Mansfield said, tenancy by the *curtesy* existed before the statute *de donis*, and the definition of it is, that the wife must be seized of an estate of inheritance, which by possibility her issue by the husband may inherit, and there must be issue born. Estates at that time were of two sorts, conditional or absolute, and *curtesy* applied to both equally; the conditional became absolute on the birth of a child, merely for the purpose of alienation only. This is only a contingent limitation, not a conditional one. "During the life of the wife she continued seized of the fee simple, to which her issue might by possibility inherit." So her husband is entitled to be tenant by the *curtesy*.

9 Mod. 147,  
151, Boothby  
v. Vernon.—  
1 Lev. 11.—  
Sir T. Raym.  
28.

§ 19. Sir Harry Boothby devised lands "to his sister, Anne Boothby, and her assigns, for her life, and that if she married and had issue male of her body, living at the time of her death, then to such issue male, and to his heirs males forever; but if she died, leaving no issue male at the time of her death, then to George Boothby, and his heirs, forever." The testator soon after died, without issue, and said Anne, his heir at law, entered, and married the deft., Vernon, and had a son and daughter by him; then Anne died, then her daughter died, and her son survived, but afterwards died. Plt is heir at law to the testator and said Anne. Held, said Vernon was not tenant by the *curtesy*; for by the will she had but an estate for life, and though the fee descended upon her as heir

at law, and she entered and became seized and possessed, yet that fee ended at her death by her son's surviving, who took the immediate remainder under the will. For the husband it was argued, that his wife was seized of the inheritance during the coverture, though determined at her death; and it is not necessary her estate continue after her death to make her husband tenant by the curtesy, if she was seized of the inheritance in her life time, which by possibility might have continued after her death, and of such she was seized before and after the marriage,—she was seized of the inheritance by descent subject to a contingent remainder to arise at her death; and cited *Plunket v. Holmes*, 6 Co. 66, case of *Archer*, *Loddington v. Kime*, *Carter v. Barnardiston*, to prove the fee did descend to her, as heir at law, till the contingent estate vested, and that her life estate did not merge in the fee, also to this purpose, cited *Purefoy v. Rogers*, 2 Saund. 388. Against the husband it was said, the Court of Common Pleas had decided, on reference to them, that he was not tenant by the *curtesy*, and it was clear his wife had but an estate for life by the devise, and that the reversion in fee descended on her; but this was not such an estate in possession, as could make her husband tenant by the *curtesy*, the son's estate intervened. Such used to be deemed in abeyance; but of late years to descend to the heir at law in the mean time, but so as not to destroy the contingent remainders. "The reversion cannot descend in possession;" and so the husband cannot be tenant by the *curtesy*. Here the testator having devised an express estate to his sister for life, and limiting contingent remainders upon her death, the fee not being vested in possession in any body, must remain in himself." And "wherever an estate is to be determined by express limitation or condition, upon the death of the wife, there the husband shall not be tenant by the *curtesy*." As wherever the contingent estate to arise on her death, intervenes between her estate for life, and the inheritance in her, her husband is not tenant by the *curtesy*. And for these reasons the court decided against the husband.

§ 20. *Seizin by co-tenant in common, where sufficient.* A died leaving a wife, a son, and a daughter. The widow entered upon the estate, and was seized as tenant in dower of one part, and as tenant in common with her son of another part, and of a third part as guardian in socage to her son. The son died beyond sea, under age, whereby the daughter became entitled, who, an infant, married the plt., and they applied to the mother to be admitted into possession of the son's part, and she refused, and held the land for him supposing he was alive. The daughter died. And held, her husband was

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2 Eq. Ca. Abr.  
729, 730,  
*Sterling v.*  
*Penlington.*  
—3 Atk. 469.  
—*Cruise tit.*  
5, c. 1, s. 13,  
14.—3 Wils.  
621.—7 D. &  
E. 390.—8 D.  
& E. 213.—  
*Watkins' Law*  
*of Descents,*  
28, 82.

**CH. 130.** tenant by the curtesy ; for the mother after the son's death  
**Art. 3.** was seized in common with the daughter, and this was her  
 ~~~~~ seizin ; " for the entry and possession of one tenant in com-

15 Mass. R.
291, 294.

mon is the entry and possession of the other." The mother did not keep possession with an intention to exclude the daughter. But if one tenant in common enters, claiming the whole to the exclusion of the other, this may not serve as the entry of his companion, being made directly against him. If he rebuild on the land in the place of buildings burnt by an enemy, he is not entitled to any allowance.

3 Dyer, 357,
Chycke's
case.

§ 21. Held, where the estate is to the wife for her life, remainder to her son for his life, and the fee simple to the wife, her husband cannot be tenant by the curtesy. Estate by curtesy is complete, without entry. 1 Cru. 124.

1 Bac. Abr.
660, 661, 662.

§ 22. Aliens cannot be tenants by the curtesy, be they friends or enemies, and their titles shall never arise. Nor can one be such of a trust, nor could he be of a use at common law, nor of a mere annuity ; but may be of an equity of redemption.

1 Bac. Abr.
663.

§ 23. A woman seized in fee marries, and has issue, and then her husband dies, and she marries a second husband and has issue by him, and dies, he is tenant by the curtesy, though the first issue be living ; for the issue by the second husband, by possibility may inherit ; as if the first issue die without issue, whereby it comes to the uncle, &c.

1 Bac. Abr.
664.

§ 24. A woman, tenant in tail, after possibility of issue extinct, takes husband, and has issue, and the fee simple descends upon her, be it before or after marriage, the husband shall be tenant by the curtesy, because by the descent of the fee the other estate was gone, and she became tenant in fee simple executed, or in possession.

1 Bac. Abr.
665.

§ 25. If the wife be seized during coverture, it is sufficient, though disseized before issue born, for the disseizin leaves a right in the husband to be tenant by the curtesy if he have issue, as it does in the wife and her heirs, to have the inheritance.

1 Bac. Abr.
667, case of
Hutchinson.
—Petition of
Bradbury &
al. A. D. 1810.

§ 26. A writ, *de partione facienda*, lies against a tenant by the curtesy ; and in our practice the tenant by the curtesy joins with the heirs in a petition for partition. Case of Governor Hutchinson and others, in the years 1767, 1774, of lands in Sanford ; of Bradbury and others, of lands in Newburyport. In these and other cases the husband's estate by the curtesy is stated, as also the estates of the others, that they may hold under the partition according to their title.

1 Bac. Abr.
668.—1
Cruise, 125.
—Issue barred

§ 27. If tenant by curtesy alien in fee, in tail, or for the life of the lessee, he in the reversion shall have a writ of entry by warranty, 4 Cruise, 56.

y in *casu consimili*, presently, by the statute of West. 2, ch. 4. And if he be impleaded, he shall have aid of him in reversion. The privity between him and the heir is inseparable; and the heir, and, by statute of Gloucester, ch. 5, the grantee of the reversion, have waste against him. And 1 Cruise, 24.

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§ 28. The husband leaving his wife, and living with another woman, does not forfeit his tenancy by the curtesy. 1 Bac. Abr. 669.

§ 29. A *feme sole* mortgages her estate, marries, and dies; her husband, tenant by the curtesy, has the redemption of this land, considered only as a pledge. And he may be tenant by the curtesy of a trust estate, as where his wife is *cestui que trust*,—but not of her separate real estate. But *quære*, and see cases above. Reeve's D. R. 30.—Perkins. 467.—3P. W. 229.

§ 30. In Connecticut, seizin in the wife is not necessary to make her husband tenant by the curtesy. The Connecticut cases therefore do not support cases at common law. Reeve's D. R. 33.

ART. 4. *Estates in dower.*

§ 1. Dower is allowed—"where a man is seized of such an inheritance, that the issue which he may have by his wife may, by any possibility, inherit such estate as heir to him, she shall be endowed of a third part in severalty." But there can be no dower where the husband is joint-tenant. Nor can there be any dower to the wife if she elope; or if divorced *a vinculo*; nor is any alien dowable; nor is she dowable under nine years of age; nor of a use or trust, or of a wrongful estate. *Colt v. Colt*, 2 P. W. 640. She shall be endowed if her husband had only a seizin in law, as she has no control over him to make him take actual possession; but not if he has neither seizin in law or fact, but only right of entry or of action. 1 Cruise, 162. Co. Lit. 31, 37, 40.—Watkins, 30, 32.—2 Bl. Com. 130, 131.—1 Cruise, 156.—2 Bac. Abr. 131.—1 Cruise, 142.

§ 2. *Dos de dote peti non debet*, is thus understood. Where the grandfather dies seized of three acres, and his wife is endowed of one, by the father, who enters therefor, and she dies, the father's wife shall have only one third of the two acres; for as to the one acre, there was no mean seizin between the grandfather and his wife; but if the father had claimed the said three acres by purchase of the grandfather, his wife, after the death of the grandfather's wife, shall be endowed of one third of that acre; for where the father claims the land by purchase, he has a seizin that entitles his wife to dower, then the recovery of dower of the grandfather's wife is but an interruption for the time it continues. So if the grandfather died seized, and his grandson first endow his mother, and then the grandmother recover, as her dower, a part of the mother's, it is but an interruption so long only as Co. Lit. 31, 32. Co. Lit. 31.—1 Cruise, 131, 132.

CH. 130. the grandmother's dower continues, and when it is at an end
 Art. 4. the mother shall re-enter on the part.

§ 3. It has been settled, that the doctrine *dos de dote* holds in this State. But there is no *dos de dote* where the first dower is not assigned. 2 Vern. 403, *Hitchins v. Hitchins*.

Co. Lit. 31,
92, & 240.

The husband's seizin only for an instant does not give the wife dower. And tenant in dower is in by her husband, and continues his estate, and is not in the estate in the *post*. Watkins, 65.

Co. Lit. 31,
32.—Wat-
kins, 30, 67,
111, 36, 38
—Gil. Law of
Uses, 371.

§ 4. Of things entire the wife shall have dower specially assigned; as the third toll dish of a mill; the third day's work of a villein; the third fish; or the third part of the profits of a fair, or office. But she has not dower of a remainder or reversion on a freehold, but in a term of years she may; nor of a right, nor the wife of the heir, if he marry after abatement made, and does not enter during the marriage, for in this case he has not even seizin in law during the marriage. But she shall have dower if the estate descended to the heir, her husband, and then one abates; for in this case her husband has a previous seizin in law, and this is sufficient to entitle her to dower. And so if he be disseized or sell the land during marriage.

Watkins, 32,
38.

1 Cruise, 149.

§ 5. By Massachusetts Colony law of 1641, she was allowed dower of a reversion or remainder; but in conformity to the common law, this might be construed on leases for years, not on freeholds; and it is understood the practice has been so, and so our law of dower is understood.

Co. Lit. 22.

§ 6. She shall not be endowed of rent, reserved on a lease for life; but of rent reserved on a gift in tail, she shall. If one lease for years, and marry, and die, his wife shall have a third part of the rent reserved and of the reversion;—has dower of rent, not of an annuity; and she has a third part, according to the value at the time of assignment, except as *post*. Has dower of an equity of redemption of a mortgage for years. 1 Cruise, 150.

7 Co. 130.—
Co. Lit. 32.

Co. Lit. 32.
—Doct. &
Stud 140.—
Salk. 252.—
Hob. 153.

§ 7. She cannot enter into her dower before it is assigned to her, and at common law no damages were allowed. And a right to damages in dower die with the person, and she ought, in conscience, to have damages after request made to have it assigned. Has dower in a qualified fee. 1 Cruise, 149. Rent for life may be assigned her out of lands whereof she is dowable. Has dower in lands *escheated*, 3 Cruise, 496; and incorporeal hereditaments, 1 Cruise, 150.

Mass. Act,
Feb. 6, 1784,
s. 8.

§ 8. *Massachusetts statutes as to dower*. This act provides, that the widow may waive the provision made for her in her husband's will, and claim her dower at common law. See Ch. 127, a. 2, the clause there cited.

§ 9. This act provides, that the commissioners appointed to assign dower may first divide the intestate's estate lying in common from the others. One third of the rents &c., till dower is assigned, stat. 1816, c. 84.

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Mass. Act,
March 9,
1784.

Mass. Act,
March 11,
1784 —
Maine Act,
ch. 40.

§ 10. This act (properly our dower act) provides, "that when the heir, or other person having the next immediate estate of freehold or inheritance, shall not, within one month next after demand made, assign and set out to the widow of the deceased, her dower or just third part of and in all lands, tenements, and hereditaments, whereof, by law, she is or may be dowable, to her satisfaction, according to the true intendment of law, then such widow may sue for and recover the same by writ of dower to be brought against the tenant in possession, or such persons who have or claim right of inheritance in the same estate, in manner and form as the law prescribes."

§ 11. Section second enacts, "that upon rendering judgment for any woman to recover her dower, in any lands, tenements, or hereditaments, reasonable damages shall also be awarded to her from the time of the demand, and refusal to assign her her reasonable dower;" and a writ of seizin shall issue to the sheriff &c., in &c. form prescribed, and the officer is to cause her dower to be set out in such estate to her, "by three disinterested freeholders of the same county, under oath, (to be administered by any justice of the peace,) to set forth the same equally and impartially, without favour or affection, as conveniently as may be."

§ 12. Section third enacts, "that of estates of which a woman is dowable, and that be entire, and where no division can be made by metes and bounds, dower shall be assigned thereof in a special manner, as of a third part of the rents, issues, or profits, to be computed and ascertained in manner as aforesaid; and no woman that shall be endowed of any lands, tenements, or hereditaments, as aforesaid, shall commit or suffer any strip or waste thereon, upon penalty of forfeiting the part of the estate upon which such strip or waste shall be made, and the damages assessed for waste, to him or them that have the immediate estate of freehold or inheritance, in remainder or reversion, by any action of waste to be brought therefor; and all tenants in dower shall maintain the houses and tenements, with the fences and appurtenances whereof they may be endowed, in good repair during the term, and shall leave the same so at the expiration thereof." Then the forms of the writs of dower and of seizin are prescribed in the statute. Our statutes on this subject have always been substantially the same. By the Colony law of 1641, she had her dower in any lands &c. her husband was seized of during the marriage, for the life of another not de-

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terminated, and she had and has her dower free of all debts and charges whatever, of her husband's, when she had not consented "by writing under her hand, and acknowledged before some magistrate, or others authorized thereunto, which shall bar her of any right or interest in such estate." And she is allowed her dower when her husband's estate is taken in execution. See Executions and also Insolvent Estates. This act, as it respects damages, is according to the decisions in equity and conscience.

Mass. Act,
March 4,
1813, (c. 93.)
Mass. Act,
1816.

§ 13. By this act the wives of citizens naturalized are entitled to dower, though their husbands were aliens when married, and all settlements of reversions by the judge of probate before March 9, 1784, living the widow, are confirmed, but no alien wives are to be entitled to dower under this act.—This act of 1816 gives the widow as dower one undivided third of the income until the heir assigns her dower &c.

2 Ld. Raym.
1331.—9 Co.
16 to 20,
Bedingfield's
case.

§ 14. This was an action of dower by Anne B, late wife of Edmund B, son and heir of Henry B, against Thomas B, son and heir of the said Edmund,—and these points were resolved.

2 Dyer, 230.
—2 Stra. 971.

First. That a writ of dower lies against the guardian of the heir within age, and against the heir of full age; and that it does not lie against the tenant for years. (So is 1 Hen. & M. 367, *Miller v. Beverly*.)

Salk. 252.—
1 Stra. 625.
Not known
to the Ro-
mans, nor in
England till
the arrival of
the Saxons.
1 Cruise, 128,
129, 178.
Nor in Ire-
land before
Hen. II. Id.

Second. As to her detainment of charters, it was held, that the charters must be concerning the same land whereof dower is demanded, and not other land descended to the heir, to enable him to plead detainer of charters in bar of dower, and further only the heir has this plea, and not a stranger. 1 Cruise, 178.

Third. When the wife is endowed of the immediate estate descended to her husband's heir, if she be afterwards impleaded she shall vouch the heir, and shall be newly endowed of other lands which the heir has, but if the wife be endowed by the alienee of the husband, or by the alienee of the heir, and be impleaded, she shall not vouch such alienee to be newly endowed, for there is greater privity when the wife is endowed of the immediate estate, which the husband's heir has by descent, than when she is endowed by a stranger of another estate.

Fourth. The plea of detainer of charters must shew them in certain whereon a certain issue may be joined, or that they are in a chest or box, locked or sealed, which imports a sufficient certainty, whereon a certain issue may be taken.

Fifth. No stranger, though tenant of the land and having the evidences conveyed to him, can in a writ of dower plead detainment of charters, but this plea lies only in privity, to wit:

for the heir of the husband ; and there are five cases wherein the heir shall not have this plea, being in the condition of a stranger : 1. Where the heir has the land by purchase : 2. Where he has himself delivered them to her : 3. If the heir be not immediately vouched by the tenant in the writ of dower, but only by his vouchee : 4. If the heir came in as vouchee, having no land in the county where the dower is demanded : and 5. If he comes in as tenant by receipt ; and the reason is, that he who pleads detainment of charters in bar of dower ought to plead he has been always ready, and yet is ready to render dower if the demandant will deliver to him his charters. Evidence of the husband's seizin. 1 Cain. 185 ; 2 Johns. R. 119.

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§ 15. Dower is the consequence of the marriage contract, "and the third part of the estate the husband was seized of during the coverture, to sustain herself and younger children during her life." "She holds her dower of the husband's representative." No dower in a trust. *Bottomly v. Fairfax*, Prec. in Ch. 336 ; *Dixon v. Saville*, 1 Bro. Ch. R. 326 ; *Brown v. Gibbs*, Prec. in Ch. 97 ; *Wray v. Williams*, Do. 151 ; *Attorney General v. Scott*, Cases Temp. Talbot, 138.

Gilb. Law of
Uses, 363.—
1 Cruise,
131, 132.

§ 16. Only the tenant of the freehold estate, at least, can assign dower and grant rent &c. in lieu of it. And if the heir has been ever ready to assign it, the wife loses the *mesne* value or profits and her damages, for he holds by title, and does no wrong till demand made. But a judgment reversed may be given in evidence to shew he has not been always ready, though it cannot be pleaded as a record. And there is no dower allowed if the heir hold by remitter ; for by remitter the estate vanishes out of which the dower must come, if any dower. There are several pleas in bar of dower, as alienage, elopement, divorce, jointure, &c. When dower is assigned, it relates to the husband's death, and does away all *mesne* disseizins. An abator may assign dower. 1 Cruise, 161. So may a disseizor, and valid if no *covin* with the widow. Id. There can be no *dos de dote* till the first dower is assigned, though a right to it exist. 1 Cruise, 155.

§ 17. It is a general rule, that the wife shall not be endowed when the husband's estate is defeated by any condition in the creation of it, as the estate of the mortgagee by redemption. As if lands descend to A, who enters, and then his mother recovers dower from him, and thereby defeats his seizin wholly, and she dies, the wife of A shall be endowed. So if the seizin of the husband be evicted by a recovery upon title, his wife shall not be endowed, for this proves his seizin wrong *ab initio*. So if the heir have the land by remitter, for the reasons above.

3 Com. D.
535.

CH. 130. § 18. So if a bargain and sale be on condition, and the
 Art. 4. condition be broken, and the bargainor dies before entry, his
 wife shall not be endowed; for though the use reverts without
 entry, yet by the 27 H. VIII. the use is incorporated with
 the land, and without entry he is not seized of the land, and
 therefore his wife shall not be endowed.

6 Co. 34.
 3 Com. D.
 535.—Co.
 Lit. 31.—
 1 Cruise, 150.

So now if a feoffment be to B and his heir to the use of C
 and his heirs, B's wife shall not be endowed, for the very
 instant the estate is in him it is by the statute of uses executed
 in C. And if A give black-acre in exchange for white-acre,
 his wife may have his election of which to be endowed, for
 he is seized first of one and then of the other, but she shall
 not be endowed of both.

§ 19. It is an established rule, that wherever the wife's
 issue may inherit the husband's estate, his wife shall have
 dower; and so if the husband has a defeasible estate in fee
 or in tail, the wife shall be endowed till his estate be defeat-
 ed; for a defeasible estate vested is the same as an absolute
 estate till it be defeated, as the wife of a disseizor till the dis-
 seizin be defeated.

Lit. sect. 53.
 1 Roll. 677.—
 2 Bac. Abr.
 127.
 Perk. 333,
 334, 335.—
 1 Salk. 254.
 —1 Stra. 625.
 —1 Cruise,
 149.

§ 20. But the wife shall not be endowed where the inher-
 itance is not executed in the husband during the coverture. As
 if the estate be to A for life, remainder to B for life or in tail,
 and remainder to A in fee or in tail, A's wife shall not be en-
 dowed, for the inheritance is not executed in A. So if an
 estate be granted to A and B and to the heirs of B, who dies,
 his wife shall not be endowed, for the fee was not entirely ex-
 ecuted in him during A's life, for the estate during his life
 does not come into the possession of B's heirs. 1 Salk. 252,
 254; 1 Ld. Raym. 326.

2 Bac. Abr.
 126.

§ 21. In order that the wife may have dower in her husband's
 estate, he must have the freehold and inheritance in him *simul
 et semel*. Hence, if lands are given to him for life, remainder
 to B in tail, remainder to the husband in fee or in tail, and he
 dies, living B or any of his issue, his wife cannot be endowed;
 but otherwise, if B's estate were but a term of years, for then
 she should have her judgment of seizin for a third part, and
 seizin as of the reversion, and have one third of the rent. But
 she has no dower of land or rent if her husband before the
 marriage leased to one for life, paying rent; for then during
 the marriage he has no seizin of the freehold. But she has
 dower if he lease for years or life after marriage.

Cro. El. 564,
 Wheatly. v.
 Best.—
 1 Cruise, 149.

3 Lev. 437,
 Duncomb v.
 Duncomb.

§ 22. A, tenant for life, remainder to B and his heirs for
 A's life, remainder to the heirs male of A's body, remainder
 over; A married and died without issue. Held, his wife
 could not be endowed, because between his estate for life
 and estate tail might come B's estate by possibility, and so A

was not seized of the freehold and inheritance *simul et semel*, CH. 130.
or absolutely united in him. Art. 4.

§ 23. And wherever the husband is seized of a joint estate that survives, and dies, his wife cannot have dower. But the wife of the survivor of a joint estate of inheritance has her dower, as he by surviving becomes sole seized. No dower in estate not of inheritance. 1 Cruise, 151. 2 Bac. 126, 127.

§ 24. If the husband be seized of rent in fee or fee tail, and release it to the tenant and thereby extinguish it, yet as to the wife it continues, and she shall have dower of it ^{as} for of it her husband cannot bar her by his own act. 6 Co. 79, in Abergaveny's case.

§ 25. If the mortgagor do not redeem and the mortgagee's estate becomes absolute for an hour, his wife will have dower &c. 2 Bac. Abr. 128.

§ 26. If tenant in tail discontinue in fee and then marries and disseizes the discontinuee, and dies seized, his wife shall not have dower, for the issue in tail is remitted to his ancient estate tail, and this being a restitution to an ancient right must take place of her dower in a subsequent tortious and defeated estate. Co. Lit. 331, 332.—2 Bac. Abr. 128.

§ 27. There must be in every case a legal marriage to entitle the wife to dower, though it may often be a question what evidence proves a legal marriage. See Ch. 46, as to marriage. 2 Bac. Abr. 130.—Cruise, 186, 137.

§ 28. If a man be disseized and then marries, and dies before he re-enters, his wife cannot have dower; for he has neither seizin in law or fact during the marriage. So if the father dies seized and a stranger abates, and after this the heir marries and dies before entry, his wife is not dowable; because by this abatement the seizin in law he before had was divested before his marriage; so neither seized in law or fact during the coverture. Perk. 366, 367.

§ 29. Perkins says, if A exchange lands with B, and A enters on the lands of B, and then B marries, and dies before entry into the lands of A, B's wife shall not have dower of those lands. But *quære*, for when A quits his former lands and leaves them vacant for B, as he does by entering on those that were B's, B has the title to those that were A's, and being vacant, that is, no adverse possession, the law annexes the seizin to the title, as is invariably the case with wilderness lands,—and there is a seizin in law at least. Perk. 369. In the action of dower one holding under the husband cannot dispute his seizin.—1 Caines' R. 186.


§ 30. A disseizor, abator, or intruder of one joint-tenant may assign dower, *bonâ fide*, and without any covin on the widow's part, because compellable by law to do it, and she is not to wait till the heir will recover his land. But none can assign dower but those who have a freehold; hence guardian in *socage* or tenant for years cannot assign dower; for neither 2 Bac. 133.—Co. Lit. 35.—2 Co. 67.—3 Co. 78.—6 Co. 586.—Roll. Abr. 661.

CH. 130. has an estate large enough to answer the plt's. demands. The manner of assigning dower is prescribed in our statute before cited.

2 Bac. Abr.
134, 135.—
Cro. El. 451,
Wentworth
v. Went-
worth.—
Mordant v.
Thorold, 1
Salk. 262.

§ 31. The assignment of dower must be absolute, as the widow has an absolute title to it, and there can be no reservation of trees or other things inconsistent with an absolute assignment; and if rent or issues be assigned to the widow out of the land in lieu of her dower, such assignment must be absolute, as the dower would be; but no assignment of horses or goods, or things, not out of the lands can be a bar to dower;—and after assigned and accepted she cannot sue for and recover damages. 1 Co. L. 33.

§ 32. *American cases, &c.* The laws and cases on the subject of dower are but few in this State, compared with those in England. In that country there are five sorts of dower. As, 1. At common law: 2. By custom: 3. *Ad ostium Ecclesie*: 4. *Ex assensu patris*: and 5. *De la plus belle*. Here we allow only dower at common law. So in that country, there are many cases growing out of the distinctions of Protestants, Papists, Jews, &c. out of felonies, treasons, and some other crimes; cases of quarantine, of copy-holds, borough English, gavelkind, custom of London, and many other local customs; cases of castles, of tithes, of commons; cases of different sorts of soil, of advowsons, of villeins, &c. of fairs, markets, bailiwicks; of parks, offices, &c. none of which here exist. So in England there are many ways of assigning dower in the different kinds of estates there; and so in barring of dower in so many kinds of heterogeneous property as exist there; so as to various kinds of services, none of which apply in this State. On the whole, on examining the English books on this subject which are very voluminous, we can only extract some general principles that will be useful. In this State and the United States generally, dower is principally confined to houses, lands, and mills, and generally to no other property. Though we have numerous corporations, possessing much property, as canal, bridge, turnpike, bank, insurance, manufacturing and other property in corporations, yet no case is recollected where one of them affects dower, because the interest of the individual or husband in them, is in the shares, which are invariably personal property, and divided among the representatives of the deceased as personal property, as in the case of Russell and other cases before stated. The widow acquires a freehold estate by the assignment without livery of seizin, her title being by law, and the assignment is an act as notorious as livery of seizin, (1 Cruise, 166,) and relates back to her husband's death. So the heir has no seizin of the dower part. Id. In

dower the parol does not demur for the heir's infancy. 167. CH. 130.
 Dower may be demanded in *pais*, and after demand made, Art. 4.
 damages may arise, but not before. 168. May be demanded
 of a minor. 169. 

The principles to be extracted from the English books and material in this State and in the United States generally, in regard to dower, are as follows, to section 53.

§ 33. The widow who claims dower must have been legally married to the man in whose estate she claims it.

§ 34. He must be *naturally* dead,—a civil death gives no title to dower.

§ 35. He must have been seized in fact or law during his marriage with her of such an estate of lands, tenements, or hereditaments as his issue by her might by possibility inherit. And there is no dower if he had only a right of action, or a right of entry.

§ 36. For her to have dower he must have in him the freehold and inheritance, *simul et semel*, and no estate greater than for term of years in another, must by possibility come between the husband's life estate and his inheritance in the land. If the husband mortgage in fee and his wife join, she cannot have dower in the equity of redemption. 1 Cruise, 150.

§ 37. If the husband be seized of rent in fee or fee tail, during the coverture, he can no more by his own act alone bar his wife of her dower in it, than of her dower in the land.

§ 38. The mortgagee's wife becomes dowerable the moment his estate becomes absolute and irredeemable, and not before, and if he is seized of any defeasible estate of inheritance even by disseizin, she is entitled to her dower till it be defeated.

§ 39. No personal estate distinct from the land, assigned in lieu of dower, can be a bar to it, though issues or rent out of the land may be.

§ 40. There can be no dower where the principle of survivorship holds, as in joint-tenancy. Nor is there any dower where the husband's seizin is for an instant only. And 14 Mass. R. 351. Nor is there any dower in lands in a wild and uncultivated state, not connected with cultivated lands—can be of no value to the widow, as it would be waste in her to clear them, and dower is of a third of the income. 15 Mass. R. 164.

§ 41. Tenant in dower is in by her husband and continues his estate, and when her dower is assigned, it relates to his death and does away all *mesne* seizins. So no *dos de dote* in certain cases.

§ 42. The doctrine of *dos de dote*, as explained in the English books, holds here. So does the rule of law, that there is no dower in a remainder or a reversion on a freehold estate.

Сн. 130. though there is in a remainder &c. on a lease for years. Nor
 Art. 4. is there any dower of rent reserved in a lease for life. Nor
 ~~~~~ any when the heir is in his ancient estate by remitter.

§ 43. The assignment of dower, or of rent as dower, must be absolute, as the widow's title to it is absolute, hence any conditional or defeasible assignment is bad.

§ 44. The widow can have no dower where her husband's estate is defeated by reason of any condition or limitation in its creation. But if he be seized during the coverture, she has her dower, though he after be disseized of or sell the land. And though she may have dower of a rent, she cannot of an annuity.

§ 45. There can be no dower for the widow who is an alien, or who voluntarily elopes, or voluntarily remains away from and is not reconciled to her husband; nor when divorced *a vinculo*; nor to one under nine years of age; nor is there any dower till assigned. Nor is there dower where there is a jointure or devise in satisfaction thereof accepted. Where a devise is in satisfaction and exclusion of dower or not, see further, 2 Vern. 363; Ca. in Eq. Abr. 218; 1 Johns. R. 307; 9 Mod. 152; 3 Ves. jun. 335, 492; 2 Cas. in Eq. Abr. 439; 12 Ves. jun. 136; 4 Dallas, 415; 1 Bin. 565; 6 Ves. jun. 615; 1 Br. Ch. R. 445; Addis. 350; Ambl. 466, 682.

§ 46. The action of dower must be against him who has or claims a freehold or inheritance in the land at common law; but by our statute against him in possession, or him who has or claims right of inheritance. *Quære*, as to possession.

§ 47. Only tenant of the freehold at least can assign dower or grant rent in lieu of it. How one heir may assign it. Penning. 281.

§ 48. Tenant in dower loses the profits till she demands an assignment of her dower of the proper person. No wrong to her till she so demands.

§ 49. It is a common law principle that she commit not strip or waste, and keep her dower in repair. So our statute.

§ 50. Her right to damages dies with her, and this right is by statute law only. Equity relieves against a partial or fraudulent assignment of dower, and a new assignment may be ordered.

1 Cruise, 166.  
  
4 Johns. R. 308. Of course in dower to allow the deft. a special imparlance to the next term.

§ 51. Pleas in bar, the same in both countries generally, as not coupled in lawful marriage, alienage, elopement, divorce *a vinculo*, jointure, not seized as of dower, no demand of dower, detainer of charters, and heir always ready to assign dower.

§ 52. Only the heir on whom the law casts the estate can plead in bar of dower, detainer of charters by the widow, nor

can be in the five cases before stated. The alienee &c. cannot, because when he comes to the estate, he has an opportunity to have them or to provide concerning them.

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§ 53. So it is a common law rule, that the widow have one third of the rents, issues, and profits, where the lands cannot be assigned.

§ 54. In our law and practice there are some things not in the English law or practice on this subject : 1. By our law the writ of dower may be against one in possession : 2. If the estate in which dower is demanded, lies in common, it may be first separated : 3. Three disinterested freeholders assign and set out the dower : 4. Our statutes expressly reserve to the widow her dower when her husband's estate is taken in execution for his debts, and when it is insolvent : 5. They make special provision, as above, for women marrying aliens : 6. In England the rule is, the value of the estate at the time of assignment of dower ; our rule, if sufficiently settled, is not so, as in cases to be stated presently. *Quere*, as to tenant in possession.

§ 55. This was dower—in certain lands described in the declaration, which stated the husband's seizin &c., and alleged the deft. had entered into the premises and deforced the plt. of her reasonable and legal dower, and still held her out of the same ; and that February 18, 1803, the dower was demanded &c. Plea as to part, that at the time of the demand the deft. was not, nor has been since "the tenant in possession thereof;" plt. demurred. Held, this was a good plea ; for it was an express denial of the material facts in the declaration.

9 Mass. R.  
469, Merrill  
v. Russel.

§ 56. By our law it is conceived that the legality of a marriage contracted abroad may be tried here by a jury, and therefore a replication to a plea of "*ne unques accouple*" in a writ of dower, alleging such a marriage, may conclude to the country, and in such a replication it is not necessary to state that the marriage was had in any place in this State by way of venue, as in a trial in England of the lawfulness of a marriage in Scotland between persons honestly going there from England.

2 H. Bl. 145.

§ 57. In the assignment of dower the commissioners ought only to regard the rents and profits ; they ought to find the value of the whole estate, and then to assign as dower "such a part as will yield her one third of such income in parcels, but calculated for the convenience of herself and heirs."

Leonard v.  
Leonard, 4  
Mass. R. 533.

§ 58. In this case a father conveyed lands to his four sons, and the same day they mortgaged them to him to secure payment of a sum of money, also his maintenance for life. It was decided that these two deeds were parts of the same

4 Mass. R.  
566, Hol-  
brook v. Fen-  
ny.

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Mass. S. Jud.  
Court, Aug.  
Term, 1796,  
Keziah Coffin  
v. W. Coffin.

contract, and that the seizin of the sons was not sufficient to entitle the widow of one of them to her dower in the land, on the ground his seizin was but for an instant.

§ 59. In this case the 1st plea in bar of dower admitted that it had been regularly demanded: 2. As to two acres the plt. only proved her husband was seized, possessed, and improved for more than twenty years before the deft. became seized and possessed; and the court held, the twenty years prior seizin and possession in the husband was sufficient title against the deft. who only set up a more recent seizin and possession: 3. The plt's. husband had  $\frac{1\frac{0}{10}}{1\frac{1}{10}}$  parts in the great sheep pasture in Nantucket in common, and entitled him to 720 sheep's commons, in virtue of this said  $\frac{1\frac{0}{10}}{1\frac{1}{10}}$  sheep's commons or pasture for 19,440 sheep. Held, the plt. might claim dower in these  $\frac{1\frac{0}{10}}{1\frac{1}{10}}$  parts, upon the same principle the widow may have dower in any of our rights of common which included an undivided part of the soil in fee simple. And if there be no demand for dower it must be pleaded in abatement.

Story's Pl.  
353.

§ 60. As to assigning reversion to one heir on widow's dower after her term expired, see *Hunt v. Hapgood*, Ch. 126, a. 2.

6 Mass. R.  
498, *Perry v.*  
*Goodwin*.—  
2 Johns. R.  
485.—9  
Mass. R. 8,  
*Ayer v.*  
*Spring*.

§ 61. In this case the husband alienated the land and his wife did not sign the deed, and the alienee erected a house upon it, and in an action of dower for dower in the land and buildings, the court doubted if she was entitled to dower in this house. No review, only when there has been a trial by jury, and verdict. The demandant agreed not to demand dower in this house. In the District of Maine there was a decision that dower cannot be had of the improvement of the estate after the death of the husband, but only as the estate was when her husband was last seized.

7 Mass. R.  
79, *Sumner*,  
for partition  
*v. Parker*.

§ 62. This was a petition for partition of land of which Jonathan Ruggles died seized 1754, in fee and intestate, and in 1764, one third was assigned to his widow as her dower, and the commissioners reported to the judge of probate, that the estate was incapable "of a division among the children, without prejudice thereto, and would make but one good settlement," and appraised the estate. The judge assigned the whole estate, including the reversion of the widow's dower, to one heir; and it was held, the judge had no power to do this, and though his decree had been standing forty years, it was void, and the land still subject to partition. He had no power to decide or assign the reversion on the dower till the expiration thereof. So his decree was on a subject not within the jurisdiction of the judge, and consequently not voidable only, but absolutely void." *Parker J.* did not agree, and the Chief

Justice did not sit in the cause. Parker J. thought the judge "had jurisdiction of the subject matter of his decree, but that he exercised the same erroneously;" and that it would have been reversed on appeal, but as there was none, it is now too late to shake it. It appeared that hundreds of estates probably had been settled as Ruggles' was. *Quere*, if Parker was not right.

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§ 63. How a discharge of a mortgage affects the dower of the wife of the mortgagor who signed the deed. See *Popkin v. Bumstead*, Ch. 112, a. 5. A has an equity of redemption and dies, his widow may have dower of it against all except the mortgagee and those claiming under him. 15 Mass. R. 278.

§ 64. A. D. 1804, our Supreme Judicial Court decided, that the widow is not entitled to dower in the improvements made on the estate after her husband sells it, and therefore in the case of a mill, &c. gave judgment that of the land excepting the mills, (new one had been built) the plt. have one third part assigned as dower by metes and bounds, and as to the mills, "the residue of the premises described, and which cannot be divided by metes and bounds, that the said Hannah have her dower according to the value of the mills standing on the premises when the said Joseph, her late husband, in his life time was seized thereof and conveyed the same as aforesaid, that is to say, the value of \$43.33 annually of the rents, issues, and profits of the said mills." And judgment also for \$229.91 damages, for the detention of her dower, and costs taxed at &c.

Libby's case, Story's Pleadings, 365, 366. Same rule in New York. 2 Johns. R. 484.—Statute of N. York, 29 Sess. 168. This was the old law, as the heir warranted no more to the husband's grantee; rule is different if husband be seized.

§ 65. Several forms of declarations for dower appear drawn by Parsons, Sewall, &c. one *unde nihil habet* by second husband and wife for her dower in the estate of her first husband, stating she was his widow, who died intestate, in a plea of dower,—described the premises whereof she was by law dowable of the endowment of her first husband &c.; then avers he was seized in his *demerme* as of fee during her coverture &c., and was actually possessed and died seized, (these two facts not material) stated the year, value, demand of dower of the defts. "who then did, and now do claim a right and inheritance in the premises," and more than a month &c. had elapsed &c.

In Amer. Prec. 312, 313.

§ 66. This was an action for dower, in which the plt. demanded of the deft. her dower or just third part of, and in a certain messuage &c. whereof she by law was dowable, according to the true intendment of the law, of the said D., her late husband, and whereof she had nothing, and states her demand made on the premises to have her dower assigned by the deft., then and since tenant in possession &c., his neglect &c. as to possession following the words of our statute.

Majury v. Putnam, A. D. 1792.

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§ 67. Another form by a wife divorced from her husband for adultery committed by him, states a plea of dower wherein she demands of the deft. her reasonable dower in &c., states he was formerly her husband, was seized &c. during their marriage and is seized, states the divorce generally, demand of dower and his refusal to assign for a month and more &c., but deforceth her. Another against the tenant in possession.

Essex S. J.  
Court, 1794,  
Nich v. Lee.

§ 68. This was an action for dower; plea, always ready to render to the plt. her dower, and traverse of the demand to have her dower assigned, and prays judgment if she ought to have any damages &c. Replication, did demand, and issue.

Essex, A. D.  
1773.

§ 69. The deft. in an action of dower pleaded, that the plt's husband was *non compos mentis*, and that his estate was sold by order of court, and also another plea, that the mother held dower in the premises. Plea by Jonathan Sewall.

Essex S. Jud.  
Court, Nov.  
Term, 1789,  
Welman v.  
Nutting.

§ 70. In this action for dower there was a plea of elopement in the English form, as in Story's Pleadings, 352. The replication was, that she did not elope, and issue, and the plea was adjudged good. See this case at large, Ch. 46, a. 8; 1 Cruise, 174, 178.

Mass. Suffolk,  
Dec. 1766,  
Trueman v.  
Waters,  
Story, 358.

§ 71. In this action for dower the plea was, that the husband by his will devised to the plt., his wife, the sum of &c. annually to be paid her out of his estate in lieu of dower in his real estate, of which the land wherein dower is demanded is part, &c., and she accepted the same, &c.

Majury v.  
Putnam, S.  
J Court,  
1793. Plea  
at large, Sto-  
ry 359, 360.

§ 72. The plea in an action of dower was, that the demandant released her right of dower in the premises by a deed of mortgage given jointly with her husband, and afterwards the deft's. father recovered judgment against the husband, and levied execution on the equity of redemption, and the premises descended to the deft. On demurrer to this plea judgment was given for the deft. See this case stated, Ch. 112, a. 5. The mortgage was discharged.

Story, 360 to  
364, Hewes  
v. Luscomb.

§ 73. This too was a plea in bar of dower that the demandant and her husband conveyed to E. and F. in mortgage &c., that E. died, and F. survived and died, and the deft. as his administrator paid the bond, and got judgment on the mortgage and entered and took peaceable possession of the estate and has ever since held it. E. and F. were sureties and had the estate mortgaged to them to secure them. The demandant protesting said deed was not lost or destroyed by time or accident, for plea said it was not her deed. If the tenant do not appear the fourth day, he is defaulted, and the grand cape issues.

1 Johns. R.  
327, 329.  
His excuses  
&c.

§ 74. These are all the cases to be found in our practice as to dower of any importance, and shew in what a small de-

gree our laws on this subject have been hitherto explained by judicial decisions, or even brought into question in pleadings.

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§ 75. Though it was the opinion of Coke, Gilbert, and others, that by the civil death of the husband the wife is not entitled to dower, yet this point does not seem to be entirely settled in England, and in a late case, *Marsh v. Hutchinson*, 2 Bos. & P. 226, cases are cited to the contrary. It is not known this question has ever been started here, or has it been urged there is any civil death in this country; yet quakers and others have been banished for life, and many criminals are confined to state prisons for life. But in New York it has been decided they are dead in law.

On the plea the husband never was so seized of an estate, as that his wife can be dowable thereof, common to both countries, a multitude of questions have arisen, and whether he has had a freehold and inheritance *simul et semel* in the land. This question is not peculiar to dower, but arises also in a vast many cases in which titles to real estates are concerned in England, and in this country in other respects, though but seldom here in cases of dower. See an able treatise on dower, *Gilb. Law of Uses and Trusts*, 353 to 425. One may exclude herself from dower without writing. 4 Dallas, 300.

§ 76. In this case the court decided, that a wife may bar herself of his dower by joining with her husband in the deed of conveyance, relinquishing her claim of dower and putting her seal to the deed, or she may do it by a separate deed subsequent to and in consideration of her husband's sale. So she may pass her own land by deed executed jointly with her husband; but her covenants in such deeds have no operation but by way of estoppel. Her separate deed is *ipso facto* void, as are all the covenants contained in it. If she die after verdict, judgment against him for costs. 7 Mass. R. 31.

7 Mass. R.  
14, *Fowler v. Shearer*.

§ 77. In this case it was held, that actual corporeal seizin or a right to such seizin in the husband during the coverture is necessary to entitle the widow to dower. A legal seizin of a vested remainder is not sufficient. In this case there was an interposing estate for life in a third person which was not determined till after the death of the widow's husband; hence her dower could not at any rate commence at his death, and it must then commence in right or never.

7 Mass. R.  
253, *Eldridge v. Forrestal & ux.*

§ 78. A widow who recovers dower cannot lease it till she gets possession by execution. When the plt. recovers damages she is entitled to costs.

10 Johns. R.  
216.

§ 79. By the English law the wife or widow has her writ of *unde nihil habet* to recover her dower, and it lies where the husband is sole seized in fee or in tail, [so that the heir of his and her body can be heir in tail] and the husband aliens or is

*Law of Uses*,  
374, 375.—  
Dower in a  
trust estate in  
Virginia. Ch.  
223, a. 1, c.  
38.

CH. 130. disseized, and dies; and this writ is against him who is tenant  
 Art. 4. of the freehold of land.

9 Mass. R.  
 218, Catlin  
 v. Ware.—13  
 Mass. R. 223,  
 Lufkin v.  
 Curtis.

§ 80. Writ of dower : 1st plea, the demandant's husband was not seized &c. : 2. She signed and sealed the deed &c. Held, 1. Where husband and wife execute a deed, his acknowledgment entitles it to registry : 2. If on a deed she fixes her seal and signature, and her name is not otherwise in the deed, she is not barred of dower : 3. In dower against the alienee of the husband a widow is to recover her dower as the tenements were at the time of his alienation : 4. But in dower against the heir she is to have dower in improvements made by him after the descent ; for he may assign dower when he pleases.

9 Mass. R. 9,  
 Sheaf, appel-  
 lant, v.  
 O'Neil.

§ 81. In this case it was decided, that the judge of probate has no authority to assign dower to the widow in premises mortgaged in fee by her husband, because he does not die seized ; hence she must sue for it as at common law. The appeal was by the mortgagee, perhaps unnecessarily, as the assignment was a nullity. No *remittitur* of the proceedings, as the judge has no power in the case.

9 Mass. R.  
 13, Same  
 parties.

§ 82. *Entry sur disseizin*, same parties. Held, no answer as to an undivided third of the demanded premises, that the tenant was entitled to dower in them, and had entered and still possesses as tenant in dower ; her dower never having been legally assigned. Disclaimer as to two thirds. Replication, alienage of the tenant as being a British subject. She rejoined the treaty of 1794. Demurrer. Pleadings withdrawn by consent. Tenant defaulted ; as no dower had been assigned, and the court observed a tenant in dower cannot be seized of an undivided third part. On a divorce the wife must sue for her dower at common law.

13 Mass. R.  
 231.

9 Mass. R.  
 143, Stin-  
 son v. Sum-  
 ner ; and  
 Porter v. Hill,  
 p. 34, same  
 principle.

§ 83. *Covenant broken*. In this case Timothy Parsons by deed conveyed the land to David Hinkley, under which deed Sumner claimed to bar Parsons' widow of her dower, as she joined in the deed, and her dower recovered was the incumbrance alleged ; this deed had been a good bar to her dower. But Hinkley sued Parsons for covenant broken, and recovered the value of the lands, on the ground no land passed by the deed, it being attached and levied on. Held, in this case the deed was no bar to her dower ; for where the vendee recovers the value of the land, as Hinkley did against the vendor in covenant broken, the vendee cannot claim the land under the deed, as he cannot have it and its value too.

10 Mass. R.  
 80, Ayer v.  
 Spring. See  
 Mortgage,  
 Ch. 112, a. 5,  
 s. 55.

§ 84. This was an action of dower, and issue on demandant's marriage : 2. On her husband's seizin. Decided she was not held to prove her demand of dower on the tenant, not being in issue or denied in the pleas. Dower was demanded in

three fifths of Jordan island and buildings thereon in Saco river. The deft. entitled to three fifths undivided, had had his part set off in partition before this action was commenced and by metes and bounds. Judgment for the demandant; her third part to be assigned to her on a view of the premises of which she demanded dower. In 1784, Benjamin Cole levied his execution on the whole island (about twelve acres) for her husband's debts, and in 1787, Cole conveyed three fifths of the island which came to the tenant; of this was the demand of dower. The demandant might have been restrained to the value of the land at the time of the levy on execution against her husband, but not on these pleadings, as it does not appear any improvements have been since.

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Art. 5.

§ 85. Action for dower. March 24, 1801, John Moies, seized in fee of the premises, mortgaged them to John Hawes for \$350, &c. April 30, 1811, the same not paid nor the mortgage foreclosed, Hawes assigned to Gardner, the tenant, *bonâ fide*. Moies remaining in possession, *bonâ fide*, conveyed his right to redeem to Benjamin Bird, the demandant's husband, who entered and possessed the premises during the coverture; he, September 24, 1810, being in possession, mortgaged the same to the tenant for \$1000, then released his right to redeem to the tenant, and he entered and has since been in possession. He admitted the demand of dower &c. Held, Benjamin Bird was never seized of an estate whereof by law his wife was dowable; also held, she might have dower against all persons but the mortgagee and his assignees. This case proves that where the husband has only an equity of redemption bought in, his wife is not entitled to dower as against the mortgagee and his assigns. Hawes and all claiming under him had a good title against Moies, and all claiming under him.

10 Mass. R.  
364, Bird v.  
Gardner.

§ 86. Covenant broken against the executor of Jonathan Grout's will on his deed of lands to Hiram Newhall, who assigned to the plt. The sheriff returned, that dower had been assigned to Grout's widow on a writ of seizin of dower by three disinterested freeholders. Held, this return is conclusive, and if not true, the officer is liable to an action for a false return,—one of the committee was not a freeholder, unless his purchase of an equity of redemption made him one, and that redeemable. But the court said the sheriff's return is conclusive on the point; if the persons be not freeholders he is liable to the party injured by his false return. Her dower or life was calculated by Wigglesworth's tables.

10 Mass. R.  
313, Estabrook v.  
Hapgood,  
exr.

§ 87. In Connecticut the husband must die seized to entitle his widow to dower, but he dies seized of his lands leased only for years, as the tenant's possession is his. She has

Reeves' D.  
R. 40, 41.—  
1 Cruise, 174,  
176, several  
cases.

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Reeves' D.  
R. 48, 49.—  
1 Cruise, 180,  
194, Hitchens  
v. Hitchens.  
Wake v.  
Wake, 1 Cru.  
182.—Law-  
rence v. Law-  
rence, 1 Ld.  
Raym. 438.—  
1 Cruise, 183.

no dower where she or her husband is an alien, nor if the marriage be void. Though elopement of the wife with an adulterer by the statute of Westminster forfeits dower, it does not her jointure.

§ 88. A devise will be construed in lieu of dower, though not so expressed in the will, if such a construction be consistent with the other parts of the will. As where the testator devised one third of his estate to his wife, and the other two thirds to his children, John and Sarah, this third will be in bar of dower, as it is clear the deviser did not mean his wife should have this and another third for dower, and so two thirds, leaving but one for his children, when he gave them two thirds. On the whole, the testator's intention is the pole star in these cases, as in all others which arise under wills, and this intention may be collected from the dispositions in the will. *Whistler v. Webster*, 2 Ves. jun. 371; *Gibbons v. Caunt*, 4 Ves. jun. 849; *Hinde v. Rose*, 2 P. W. 125.

Perkins, 304.

§ 89. As dower is the continuation of the husband's estate, the heir is viewed as not seized. As if A dies, leaving B his heir, and the widow is endowed of her husband's estate, the assignment of dower defeats the seizin of B, the son and heir, and he is considered as never having been seized, and if he die before his mother, his widow can never be endowed, as he never was seized of his mother's part in dower, in deed, or in law. So in such case no *dos de dote*.

1 Ld. Raym.  
438, Law-  
rence v. Dod-  
well.—Incle-  
don v. North-  
cote, 1  
Cruise, 184,  
Boynton v.  
Boynton, Id.  
191.

§ 90. *Devise in lieu of dower according to the intent &c.* 1st rule is, a devise by a husband to his wife goes in lieu of dower, if it appear on the will so intended, though not expressed in terms to be by way of jointure: 2. A devise cannot be explained by matter *dehors* the will: 3. A general devise by husband to his wife cannot at law be averred to have been intended in lieu of dower, though in equity it may be: 4. If it appear on the will he intended the devise in lieu of dower, in an action for dower, so much of the will as is necessary to prove the intention must be pleaded at large.

Johns. Cas.  
27, Palmer v.  
Horton.

§ 91. The husband was attainted and his estate forfeited under the act of October 27, 1779. Held, his wife was entitled to dower.

6 Johns. R.  
290, Hitch-  
cock & ux. v.  
Harrington,  
Same v.  
Yates.  
Cases cited  
by the court,  
Taylor's case,  
as denying  
husband's  
seizin.

§ 92. *Dower of an equity of redemption.* Dower by Anne Hitchcock who was the wife of Moses Northrop for her dower in lot No. 168, &c.: 3d plea, *ne unque seinie que dower &c.* She was married to Northrop about January 2, 1774, and by him had issue. May 3, 1774, he purchased in fee said lot for £170 of William Smith, and May 5, 1774, mortgaged it to Smith as security for the purchase money, with interest payable in two years. Northrop took possession and resided on the lot till he died, July 5, 1778, and left the mortgage not

satisfied; his wife and family left the lot some time after his death. October 6, 1790, Smith leased the premises to J. & N. Baylies, to each eighty-four acres for ten years, at the yearly rent of 1s. an acre; they entered, and about October 29, 1799, Northrop's heir for \$165 conveyed all his right to N. Baylies, who conveyed half to Jonathan Rouse, under whom Yates held, and the other half to Harrington; Sept. 24, 1806, the Baylies and Rouse paid the mortgage off. Northrop's widow twenty-five years after his death brought her action of dower, and recovered, and damages from his death: and held, 1. The tenant holding under the heir of Northrop could not deny his seizin: 2. The mortgage being satisfied, he was deemed seized from the time of his purchase, May 3, 1774: 3. The mortgagor is deemed seized, and legal owner as to all but the mortgagee and his representatives: 4. The heir's sale cannot affect the damages: nor 5. The widow's delay to sue: 6. The tenant to excuse himself must plead *tout temps prié*: 7. On the issue of seizin in dower the act of limitation is not in evidence, but should be pleaded: 8. It seems this act does not apply to actions of dower. It will be observed in this case Northrop was seized in fee during the coverture two days before he mortgaged, and as the court said whether a seizin for an instant or not was not in question, as it might have been in another case. Also, the court viewed the mortgage as discharged and extinct, and when the Baylies & Rouse paid it, it does not appear they took any assignment of it. But was there not a constructive assignment? The debts did not hold under the mortgage, nor did the mortgagee foreclose or enter, nor the mortgagor's wife sign the mortgage; there then was no difficulty in this case on the points discussed. The material point does not seem to have been made, for the court seem to have taken it for granted when the Baylies and Rouse, tenants in possession, who entered on the mortgagee's leases, and claiming in fee under the mortgagor's heir, paid the mortgage debt, they discharged the mortgage. But did not this very payment operate in equity as a constructive assignment of the mortgage to them, as a purchase by them of the mortgage? Neither the plt's. husband, the mortgagor, nor his representatives paid the mortgage debt. See Ch. 112, a. 5, s. 1, 29, &c. for the case expressly states, that "on the 24th of Sept. 1806, the mortgage was paid off and satisfied by Baylies & Rouse."

This case does not settle the old question, that where the husband mortgages and afterwards marries, and dies existing the mortgage, shall his wife have dower. The English books say, she shall not, so our books say as to the mortgagee and all

CH. 130.  
Art. 4.

Statute of  
Merton  
adopted in  
N. York, giv-  
ing the wid-  
ow damages  
from her hus-  
band's death  
if he die seiz-  
ed—See s.  
63 and 86,  
ante

Dixon v. Sa-  
ville, 2 P. W.  
72.—Ch. 112,  
a. 1, s. 6, 69.

CH. 130. under him. See Ch. 112, a. 2, s. 21 ; Ch. 114, a. 16, s. 9, Art. 4. Burgess v. Wheat ; Ch. 223, a. 11, s. 44, cases.

§ 93. In this case there is a like questionable doctrine stated by the court in saying, a purchase of the mortgage from the mortgagee is in effect a discharge of the mortgage in favour of the title under the mortgagor. In this case the husband was seized in 1775, 1776, &c. under one Merrick's deed, dated May 9, 1775. But Merrick had mortgaged to Gilbert Fonda, June 18, 1772, for £161. 4s. payable June 18, 1777, with interest assigned by Fonda's executors, May 14, 1801, for £200 to Ann Winston. Interest paid June 9, 1784, and endorsed. Hence the plt's. husband purchased only Merrick's equity of redemption, so he could be seized but of such equity. But held, the mortgagor's estate is at law the real estate, and his widow may be entitled to dower, and the tenant deriving title under him cannot deny his seizin ; nor can he set up the mortgage as a subsisting title, there having been no foreclosure or entry by the mortgagee. Judgment for the plt.

7 Johns. 278,  
Collins v.  
Torry.

As to dower  
in a trust es-  
tate, or in an  
equity of re-  
demption,  
Ch. 223, a.  
11, s. 44,  
most of the  
English cases  
cited, and an  
important de-  
cision in Vir-  
ginia there-  
on.

#### NOTE.

Wigglesworth's table of lives adopted by our Supreme Judicial Court, by which it appears a person forty years old in Massachusetts or New Hampshire may expect to live twenty-six years  $\frac{4}{10}$  of a year, &c. &c. Lives good as follows :—

|             | Years. |
|-------------|--------|
| 1 year old  | 28.15  |
| 5 years old | 40.87  |
| 10 "        | 39.23  |
| 15 "        | 36.16  |
| 20 "        | 34.21  |
| 25 "        | 32.32  |
| 30 "        | 30.24  |
| 35 "        | 28.22  |
| 40 "        | 26.4   |
| 45 "        | 23.92  |
| 50 "        | 21.16  |
| 55 "        | 18.35  |
| 60 "        | 15.43  |
| 65 "        | 12.48  |
| 70 "        | 10.6   |
| 75 "        | 7.83   |
| 80 "        | 5.85   |
| 85 "        | 4.87   |
| 90 "        | 3.73   |
| 95 "        | 1.62   |

**ART. 5. Jointures.**

CH. 130

§ 1. "A jointure was no bar of dower before the 27 H.

Art. 5.

VIII. c. 10, (cited under the head of Uses) for her right or title to a freehold cannot be barred by the acceptance of a collateral satisfaction." "But by that statute it is a bar of dower, if made according the form of it," to wit: 1. "It must be by the first limitation to take effect in possession in profit presently after the husband's death": 2. "It must be an estate for her life at least, but may be limited to continue so long as she remains sole, or shall do or forbear to do any act in her own power": 3. "It must be expressed or averred to be in satisfaction of her whole dower:" 4. "The estate of the land must be in her, not in trustees for her:" 5. "It may be made before or after marriage, but if after, it does not bind her from claiming her dower;" "and it may be limited to her alone, or jointly with her husband. And a jointress may enter into her jointure immediately on her husband's death." So in this respect better than dower.

§ 2. In this case A conveyed lands to B to the use of the husband for life, and after his decease to the use of his wife for life, and after her death to the use of the right heirs of the husband, and it was not said in the conveyance that it was in lieu of dower, but the deft. averred it was for her jointure, and in full satisfaction of her dower; and that after her husband's death she entered on the said land, and so limited to her for her jointure, and agreed to it. The demandant admitted the conveyance and uses, but said it was on condition she should perform her husband's will, and produced the will, and demanded judgment, if the tenant should be admitted and received to aver that the estate so limited to the wife on said condition was for her jointure and in satisfaction of her dower. The deft. demurred.

§ 3. In this case five points were decided: 1. That by common law a title to a freehold or inheritance cannot be barred by the acceptance of any manner of collateral satisfaction, but only release &c. As if A disseize B of black-acre, held in fee or for life, and afterwards gives him white-acre in fee or for life, in full satisfaction for all his rights and actions which B has for said black-acre, which B accepts, yet B may enter on black-acre and recover it in a real action. Several cases cited in this case. If after the husband's death the heir make an estate to the wife for life of any lands whereof she is not dowable in full satisfaction of her dower, this is no bar of it, nor was such estate at common law, though made by her husband; but a jointure bars dower by 27 H. VIII. c. 10. Before that statute was made most of the lands in England were conveyed to use, and as a wife could not have dower of

2 Bl. Com.  
137, 138, 139.  
—Co. Lit. 36,  
37.—Hob.  
151, 153.—  
4 Com. D.  
407.—  
Reeve's D.  
R. 41, 42, &c.  
—13 Ves.  
445.—3 P.  
W. 269.—1  
Cruise, 196  
to 242.—4  
Co. 1 to 5

Vernon's  
case, cited 1  
Cruise, 204.  
—3 Atk. 8.—  
1 Dall. 415—  
1 Binney's R.  
565.—1  
Johns. R.  
307.—1 Cru.  
Dig. tit. 7,  
ch. 1, s. 1 to  
4, 30 to 32,  
ch. 3. Tit. 6,  
ch. 5, s. 22,  
&c.—Cases  
as to jointures, see  
also 4 Cruise,  
289 to 292.—  
4 Hen. & M.  
23 to 57.

CH. 130. uses, jointures were made for her support, and when that act  
 Art. 5. was passed transferring the estate and possession to the use, she would have had her jointure and dower both, as the husband thereby had the estate as he had the use, but a provision was inserted declaring jointures made should be in bar of dower.

§ 4. Second point, the act provides five forms of making jointures : 1. To husband and wife and the heirs of the husband : 2. To husband and wife and to the heirs of their two bodies : 3. To husband and wife and to the heirs of the body of one of them : 4. To husband and wife for their lives : 5. To husband and wife for the life of the wife. The court held, that these cases were but for examples, and that many other estates are within the act, though not expressed in it ; hence, if a man make a feoffment to the use of himself for life, and afterwards to the use of his wife for her life, this is a good jointure within the act. But the estate must be for her life and in all events begin immediately after the death of the husband. Therefore, if the husband make a feoffment in fee for the use of himself for life, and afterwards to the use of B for his life, and afterwards to the use of his wife for life for her jointure, it is no good jointure within the act, though B die, living the husband ; for it was not certain her estate would have begun on her husband's death, and *quod ab initio non valet, in tractu temporis non convalescet*. A trust is a good equitable jointure. 1 Cruise, 202.

§ 5. Third point resolved was, that this estate to Mary Vernon, though on condition she perform her husband's will, which implied a consideration, was within the act, if she after his death accepted it ; for it was in her power to perform the condition, and an estate to a wife during her widowhood is a good jointure, for it is for her life if not determined by her own act ; same as to a condition, for if she do not break the condition, it is an estate for life ; and if the condition be a hard one, she may waive the jointure.

§ 6. Fourth point resolved was, that if a jointure be made before marriage, the wife cannot waive it ; for the act speaks only of jointures made during the marriage, and if land before marriage be conveyed to her as jointure in part of her dower, and after marriage more land in full satisfaction of her dower, she may hold the jointure and also claim her dower.

§ 7. Fifth point resolved was, that though the estate was given to Mary Vernon on an express condition to perform her husband's will, which imports a consideration of making the estate, yet it may be averred to be for her jointure ; for the one consideration stands well with the other, and though it be not expressed in the deed yet it may be averred.

- § 8. Sixth. A man may devise a good jointure to his wife **CH. 130.**  
his will, and if she accept it, her dower will be barred. **Art. 5.**
- § 9. 2 Bl. Com. Christian's notes, a jointure is not forfeited **Doct. & Stud.**  
adultery, as dower is. Tenant in tail cannot in law or **Ch. 28.**  
conscience make a jointure out of his estate in tail for his  
fee, though she may have dower in it.
- § 10. This Vernon's case contains all the material parts of **See 2 Ves. jr.**  
the law on this subject. And this act of 27 H. VIII. c. 10, **272, Frink v.**  
has been adopted here, as has been decided in the case of **Stamford.—3**  
**Ves. jr. 249,**  
**Strahan v.**  
**Sutton.**
- § 11. This Vernon's case contains all the material parts of **See Drury v.**  
the law on this subject. And this act of 27 H. VIII. c. 10, **Drury, 5 Bro.**  
has been adopted here, as has been decided in the case of **P. C. 670.—**  
**Creswell v.**  
**Byron, 3 Bro.**  
**C. C. 362.**
- § 12. This Vernon's case contains all the material parts of **Pickering v.**  
the law on this subject. And this act of 27 H. VIII. c. 10, **Ld. Staniford,**  
has been adopted here, as has been decided in the case of **3 Ves. jr. 332.**
- § 13. Our Colony law of 1644 supposed a widow might **Reeve's D.**  
be barred of her dower by a jointure settled on her before **R. 42.**  
marriage in some houses, lands, tenements, or other heredita-  
ments, for term of life. And chancery bars her dower by an  
estate in trust settled as a jointure.
- § 14. If the wife has an ancient right in the lands before **Cro. Jam.**  
coverture, and afterwards takes a jointure of the same lands, she **490, Wood v.**  
shall be *remitted* to her ancient title, *volens volens*, immedi- **Shurley.**  
ately on her entry, and then the jointure fails and she may re-  
cover her dower.
- § 15. An estate was settled to the husband for life, remain- **Hob. 72,**  
der to the wife for a jointure, except such of the lands as the **Same case.**  
husband should devise; held, this exception was repugnant to  
the grants, as the settlement might be avoided by the husband's  
devising the whole.
- § 16. If it appear the devise to the wife be intended to be **Lut. 737.—3**  
in bar of dower, though not expressed to be a jointure, she shall **Com. D. 641.**  
be barred of her dower. By the 27 H. VIII. if she be evicted **—6 Ves. jr.**  
of her jointure, or part thereof, shall have dower as much **615.**  
as she loses, but she shall be endowed for life only, though she  
be evicted of an estate tail or fee. See *Eastwood v. Vinke*, 2  
P. W. 613; *Foster v. Cook*, Bro. Ch. C. 351.
- § 17. And a term for 100 or 1000 years, or an estate in **Co. Lit. 36.—**  
trust, is no jointure to bar dower within the statute, for it is not **Lut. 737,**  
a freehold estate; nor is it, if limited in bar of part of her **Tenney v.**  
**Tenney.—3**  
**Atk. 8.—6**  
**Ves. jun. 615.**

CH. 130. dower. And it is said a devise cannot be averred for a jointure, if the words of the will do not import it; but by our Statute of Feb. 6, 1784, a devise to her from her husband is a bar of her dower if she accept the devised estate, "unless it appears by the will plainly the testator's intention to be in addition to her dower."

Co. Ent. 171.  
—Hob. 71,  
104.—Co.  
Ent. 172.

§ 16. The tenant may plead generally, the wife had a jointure, or a jointure made during coverture, to which she assented after the death of her husband; and the demandant may reply, that the estate was not made to such uses, or that it was not for a jointure.

3 Bro. Par.  
Ca. Burks v.  
Drury.

§ 17. In this case it was settled, that a jointure settled on an *infant* wife was a bar of her dower, as being a *provision made by the husband for the wife*, especially if a competent livelihood; and the law is the same whether the wife be an adult or an infant, in neither case does it bar her of her dower if an incompetent livelihood. After many doubts, this point was settled in the House of Lords; three judges thought the *infant* wife not barred, six judges thought she was; and Lord Mansfield, one of the six, declared a jointure was *ex provisione hominis*, and not *ex contractu*.—But has not the statute declared that a jointure made as directed in it shall be a bar of dower, of whatever age the wife may be? If the jointure fail in part, for defect of title, she has a claim on his other lands; so if it fall short of his covenanted value, or she may be viewed as a creditor for the deficiency. 4 Bro. Parl. Ca. 586, 604. And in some English books it is said she may commit waste, so far as to make up this deficiency of her jointure.

1 Atk. 440.—  
2 Eq. Ca. Abr.  
241.

15 Mass. R.  
106, Gibson  
v. Gibson.—  
See Ch. 114,  
a. 17, s. 3.

§ 18. On a writ of dower, held, an annuity settled on the wife before marriage in lieu of dower was no bar to it, though the settlement be by indenture &c., and the annuity secured to a trustee of the wife, and accepted by her and she covenanted not to claim dower, &c. because not a freehold in *lands* &c. as by 27 H. VIII. c. 10.

1 Cruise, 179.  
—1 Inst. 36.

§ 19. *A devise to the widow in lieu of dower or jointure or not*, &c. 1. Generally it is no bar of either, as every devise or bequest imports a bounty,—then to be a bar it must be so expressed; but see Art. 4, s. 88, &c. ch. 178, a. 13, &c. ch. 223, a. 11, s. 47.

Sugden, 258,  
659. Bac. Abr.  
Jointure (B)  
6.—Vigard v.  
Longdale.—3  
Atk. 3, 8.—  
10 Ves. jr. 20.

§ 20. *Jointure in equity*.—Equity appears to view any provision, however small or precarious it may be, which an adult previous to marriage accepts in lieu of dower, a good equitable jointure. Charles v. Andrews, 9 Mod. 152; Williams v. Chitty, 3 Ves. jun. 345; 4 Bro. C. C. 515; 5 do. 581; Ambler & ux. v. Norton, 4 Hen. & M. 23; Jordan v. Savage. So equity often implies that a provision is in lieu of dower, though not so expressed; (Couch v. Stratton, 4 Ves. Jun. 391,

395, and the case cited therein,) that is, when it can be inferred the parties so intended it. *Webb v. Evans*, 1 Bin. 572; *Van Orden v. Van Orden*, 10 Johns. R. 30; *Herbert & al. v. Wren*, 7 Cranch, 370; see this case, ch. 225, a. 6, s. 24; 2 Johns. Ch. R. 448; 4 Desaus. Ch. R. 293, ch. 130 a. 5, s. 10.

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Art. 6.

§ 21. So infants, by 27 H. VIII may be barred of dower by an equitable jointure, as at law so in equity; but then it must be as certain as her dower. *Smith v. Smith*, 5 Ves. jun. 189, 194, and cases therein cited; *Caruthers v. Caruthers*, ch. 35, a. 6, and 4 Bro. C. C. 500 and 506; & *M'Donald v. Hanson*, 12 Ves. jun. 277. See an important case of a jointure, 4 Hen. & M. 23 to 57, and many cases there cited; stated ch. 223, a. 11, s. 47.

Sugden, 259.  
See Ch. 35, a.  
6.—4 Ves. jr.  
667.—18 Ves.  
sey, 512.

#### ART. 6. *Goods and chattels.*

§ 1. It is often a nice question, when there is a remainder in these to be granted, or bequeathed over, after a life or some certain estate is carved out of them; and it is often difficult to know what particular estate is carved out of them, whether for more or less than a life; not from any uncertainty in the rules of law, but from the uncertainty of expressions men make use of. As where this kind of property is given, or devised to A, and if he die without leaving issue then to B, or if given or devised to A with a power doubtfully expressed to dispose of the same. The disputes in these kinds of cases have mainly arisen from the uncertain meaning of the words, *leaving issue*, &c. The general principle is plain, as in *Lampet's case*, stated ch. 1, a. 5, and other places, that a life estate may be given to one in goods and chattels, or in the use of them, and the remainder over to another, or an estate in them for the life of one, 21 years and time of pregnancy added, and remainder over to another so far as there shall be any remainder. And on the other hand the rule is clear, that there cannot be any remainder over in this kind of property after such length of time. And the real inquiry is, which are the cases that come, or not, within the principle. And so are the vast variety of expressions different men make use of in their wills and grants in these respects, that cases have arisen and will arise without number, and nothing more can be done within reasonable limits, than select some of the most useful cases or authorities, and which serve as the best guides. And it is the object in this article to add a few cases on this subject to those already stated in ch. 1, a. 5; ch. 104, a. 2; ch. 110, a. 5; ch. 114, a. 15, s. 31.

Ch. 114, a. 15. Lord Montfort settled his household goods in trust for himself for life, remainder to his wife for life, remainder to the sons of the marriage in strict settlement; and it was held, the absolute property was in the oldest son, there

CH. 130. could be no limitation further. So it has been stated ch. 114,  
 Art. 6. a. 15, a tenant for life of goods cannot pawn them, for they  
 are held in trust for him in remainder; and ch. 114, a. 31, a  
 life estate in law takes the whole term for *years*, or *personal*  
 estate; all the interest after this life estate is necessarily *execu-*  
*tory*, to arise and vest on some event to happen in this legal  
 time.

2 Fearn's  
 Ex. Dev. 225,  
 226.

Attor. Gen. v.  
 Hall.

2 Fearn's  
 Ex. Dev. 726  
 to 230.  
 Gordon v.  
 Adolphus.

Fearn's Ex.  
 Dev. 231 to  
 232, 233.

9 Ves. jr. 197.  
 —7 East, 271.

§ 2. This was a bequest of real and personal estate to his son H, and to the heirs of his body, and if his son H died, leaving no heirs of his body living, then the testator gave so much of his real and personal estate as *his said son should be possessed of* at his death to the Goldsmith's Company of London. Held, this remainder to the company was void, as the absolute ownership had been given to H, for it was to him and the heirs of his body, and the company were to have no more than he should have left unspent; so he had power to dispose of the whole. and wherever the first legatee has the absolute property, the devise over is void.

§ 3. In this case the testator bequeathed the whole of his estate he should be possessed of to his wife for her widowhood, and if she married, then all the residue of his estate to his daughter, that is, interest thereof, but no husband she should marry to have any power over it, and her receipts to be discharges, and if she died "without leaving issue," then among his sister's children, *if his daughter died without a will*, and by her will she might give it among his nephews most deserving her favor, but not out of his family. The testator's daughter died intestate, and without issue, and his sister's children claimed the residue of his personal estate; they recovered it in the House of Lords: the wife and daughter had life estates, the sister had no general power of disposal, but only to appoint to particular persons: this did not give her the absolute property, so the gift to her children of the remainder was good. It was argued the daughter had an absolute estate, and dying, *without leaving issue*, was the same as *dying without issue*, but the court said the word related to her death, as she was enabled to make a will.

§ 4. The words "*die without issue*," as applied to a term for years, mean without issue *living at his death*. Fearn states the reason to be, "in respect to an inheritance, the words *dying without issue* are taken to mean an indefinite failure of issue, in order to create an estate tail in favor of the issue, who are capable of taking an *inheritance*, but with respect to a term, such a construction cannot benefit the issue, because a *term* cannot descend to them." But this distinction is not general, nor one's *dying without issue*, confined to his death, but where there are some special cir-

instances so to confine them. According to what was said **CH. 130.**  
**Forth v. Chapman**, stress has been laid on the word *leave* **Art. 6.**  
*sue* or *leaving* no issue, as one circumstance. On the whole,  
 the rule, that limiting "a term over after a *dying without*  
*sue*, even in such cases where the limitation would only have  
 given an estate tail by implication in a real estate, is to be ta-  
 ken in the legal extent of the expression, and, therefore, the  
 limitation over being (in that sense) too remote, is utterly  
 void."

§ 5. As where a lessee for 1000 years, without impeach- **2 Freem. 210,**  
 ment of waste, devised to L, and if he should *die without* **Burford's**  
*sue*, then to B, the court held, that "the remainder was void, **case.**  
 and that the whole vested in L, his executors, and administra-  
 tors."

§ 6. Where a personal estate was devised to A, and in case **2 Fearn's**  
 he should *die without issue*, then to B, it was resolved, that **Ex. Dev. 233,**  
 he devise over to B was void, and the whole decreed to A. **Green v. Rod.**  
 So was the case of *Green v. Rod*, 234. And it may be **—6 Cruise,**  
 added, and so are scores of authorities. *Atkinson v. Hutchin-* **492. Keily v.**  
*son* was different, it was, without *leaving issue*; and in a prior **Fowler. See**  
 part of the will, the words without *leaving issue*, were so con- **s. 19.**  
 nained by the use of the word *survivor*, and then the same  
 meaning was affixed to the words subsequently used. In  
*Keily v. Fowler*, in the House of Lords, the words, *dying*  
*without issue*, were restricted to the death of the first taker,  
 by adding, that *then* the property should return back to his  
 executors, and be distributed by them, a thing that could not  
 be viewed as relating to an *indefinite* failure of the daughter's  
*issue*; and other words show the failure of issue was confined  
 to the lives of J. D. & G. H. G., persons living when the will  
 was made.

§ 7. So in *Balguy v. Hamilton*, Moseley's R. 186, the words, **Balguy v.**  
*the daughter's dying without issue*, were evidently confined **Hamilton.**  
 to her dying without issue before twenty-one, by a devise over to  
 a brother in that event, he paying, &c.; showing the testator  
 meant a dying without issue in his life time. So was *Fisher v.*  
*Smith*, in substance, the failure of the issue, evidently, was **Smith.**  
*living C & D*, as a division was to be between them.

§ 8. And the true principle of all these cases is stated in **1 D. & E. 593,**  
 this case of ejectment for *leasehold* premises, of which S. **Doe v. Lyde.**  
 Lyde, being possessed, Mar. 16, 1775, bequeathed "them to  
 his son George Lyde for life, and after his decease to Margaret  
 his wife for life, and after the decease of the survivor, to the  
 children of George, share and share alike; but if George  
 should die without issue of his body, then to his son Robert  
 Lyde for life, and after his decease to Mary his wife, with  
 the like limitation to the children of Robert, as to those of

CH. 130. George, and if Robert should die without issue, then over.”—

Art. 6. May 12. 1778, the testator died; May 17, 1778, Margaret died, having had one daughter only by George Lyde, who died an infant before the date of the will. May 1784, Robert Lyde died, without issue, having appointed his wife Mary, lessor of the plt., executrix. Oct. 22, 1785, George Lyde died without issue, leaving a second wife, the deft., his executrix and residuary legatee. Judgment for the plt., Robert’s widow, Mary; for the limitation to her is good, as George Lyde died without leaving issue, and Robert Lyde died in his life time. George Lyde had no issue when the will was made. Buller J. said, if this had been a freehold estate, George would not have had an estate tail, as it was to his children *equally*, and so as *purchasers*, and not in *succession*, as it must be if a fee tail. Then, according to *Keily v. Fowler*, the testator’s intention must govern; and here it was plain, because he “has expressly given the estate to Robert Lyde for life, in the event of George Lyde’s dying without issue, which shows the testator looked to the event of George Lyde’s dying without issue, *at the time of his death*,” and *in Robert’s life time*; this confined the event to a life in being. Buller J. in this case also said, two distinctions have also been taken; “the first is that in case of a bequest of a term or chattel, the words, *dying without issue*, shall be considered with a double aspect, comprising two contingencies; the one, if the person die *without leaving issue*; the other, if he die *leaving issue*, which afterwards die without issue.” Now in this case the contingency has “happened within the time limited,” a life in being. Buller further, in this case, adopted Lord C. J. Wilmot’s doctrine in *Keily v. Fowler*, where the words were “heirs of the body;” that is, the court is “bound to an artificial and technical sense of those words, unless there is an apparent intention in the testator of using them in their natural meaning.” In the bequests of terms, he also said, “if the *intention of the testator is clear*, there is no case in law which says, that the intention shall not prevail.” And “the *most trifling circumstance is sufficient*,” to make the *natural* meaning of words prevail over “an *artificial and technical* sense of those words.”

2 Fearn’s  
Ex. Dev. 372,  
by Powell,  
259, 260.

§ 9. Fearn, after examining many of these kinds of cases, makes these sensible observations. Though “in the limitation of a personal estate after a *dying without issue*, those words shall not *ex vi termini*, and *without* the concurrence of any other circumstance of intention, signify a dying without issue *then living*, even though the limitation is in the nature of an estate tail by *implication* only; yet, on the other hand, they shall not *ex vi termini*, when there is any other circumstance of intention, import an *indefinite* failure of issue, even though

The limitation is in the nature of an *express* estate tail ; but that in either case, if the limitation rests solely upon the usual content and import of those words, the limitation over is too remote, and therefore void, and the whole vests in the first devisee or legatee ; but that in either case, " the signification of these words may be confined to a dying without issue *then living*, by any clause or circumstance in the will, which can indicate and imply such intention."

§ 10. As to the validity of the limitation over, " it is the same thing, whether the devise of a personal estate or term be to one *for life* expressly, and if he *die without issue*, remainder over ; or to one, (indefinitely,) and if he *die without issue*, remainder over." As in this case the devise was to Nichols for life *expressly*, and if he *die without issue*, remainder over, the remainder was held void ; 5 Ves. jun. 440, as too remote.

§ 11. A, possessed of a term of ninety-nine years, devised it to B for life, then to C for life, and so on to five others successively for life. After the death of all seven, it was held, the residue of the term reverted to the testator's executors. So that, though a life estate is viewed as greater than a term, yet, in fact, when a life estate only is given out of it, there is, by possibility, a remainder over and above the life estate, which, if not devised or granted, reverts to, or continues in the testator or donor, the owner of the term. In this case every devisee in his turn had the whole term vested in him, and each next remainder-man had but a *possibility* of a remainder, and no *actual* remainder, and the executor of the devisor a possibility of a reverter. For there may be a possibility of a reverter even where no remainder can be limited. As where a gift is to A and his heirs while such a tree stands, no remainder can be limited over ; and yet, clearly, the donor has a possibility of reverter, though no actual reversion. The testator gave but a limited estate, and what he has not given away, must remain in him ; and the words, *for life*, can no more be rejected in the last limitation than in the first. Yet if it appears to be the intention of the testator to devise, or dispose of the *whole term* from his executors, and he devise it to A for life, a day, or an hour, remainder to B, and the remainder to B is void, A has the whole term ; because then as it is not the donor's intention it go to his representatives, it must go to the donee to whom it is given or devised for any time, where he in remainder cannot take. But where the intention of the testator to dispose of the term from his executors does not appear, and he devises it to one *for life*, he has not the whole term so absolutely, as that he can dispose

CH. 130.  
Art. 6.

2 Fearn's  
Ex. Dev. 373,  
by Powell,  
261, 275.—  
1 Mod. 60,  
55, Love v.  
Windham.

Salk. 231,  
Eyles v.  
Faulkland.—  
2 Fearn's  
Ex. Dev. 278,  
cited 6  
Cruise, 267.

CH. 130. of it; but a possibility is left to go to the executors of the testator on the death of the devisee.

Art. 6.



1 Freem. 250,  
Kimpland v.  
Courtney.

§ 12. In this case A being possessed of lands for a term of 1000 years, devised the said lands to B for fifty years, if he lived so long, and after the decease of B devised the lands to C. Held, B took no estate for life by implication; but in case he had over lived the fifty years, then the executor of the deviser should have held the lands during B's life.

§ 18. There is another way of confining the words, *dying without issue*, to a *life in being*; that is, by limiting the remainder over to one *in being* for his life, as an estate, *personally*, to him, which, therefore, he must take in his life time, or not at all; so that it appears in his life time the testator intends the contingency shall happen. This principle is apparent in *Lyde v. Lyde*, and in another case in *Pollexf. 30*. As "where a term was limited in trust for one for life, then for his wife for life, then for B for life, then for his children for their lives, and *for want of such issue*, to J. for life, then to his children for their lives, and for want of such issue, then to S. C. *for life*, with other limitations over." The first devisee and his wife died, and B. and J. died without issue. Held, the remainder to S. C. *for life*, was good, because to take place, if at all, in his life time, a life in being when the will was made, and so not too remote &c., and so no perpetuity.

Oakes v.  
Chalfont;  
cited  
Fearn's  
Ex. Dev. 376,  
by Powell,  
279; cited  
6 Cruise,  
498.

1 Salk. 156,  
Wiggins v.  
Derby.—1  
Salk. 159.

§ 14. The trust of a term was limited to husband and wife for life, remainder to sons in tail, and on failure of sons, to daughters. Held, they could not take, though no sons existed, for a remainder in a chattel after an estate tail in the sons, was too remote; but if it had been, if sons, then to them in tail, making their estates contingent, remainder to the daughters, their remainder had been good, if no sons existed; for the devise of a *chattel* or term for years may be to a son in tail, if one shall be born, remainder valid to another person, if no son be born; for then the remainder vests absolutely at the end of a life in being, the mother's death, of such supposed son.

7 East, 269,  
274, Doe v.  
Cooke & al.;  
many cases  
cited—9 East,  
366.—1 Wils.  
140.—9 Mod.  
444.—Cro.  
El. 525.—6  
Bos. & P. 38.

§ 15. Devise of a term to one for life, may give the devisee the whole term, if so intended. As where Thomas Browning possessed of a leasehold for a long term after the death &c. of Susanna Kelway, devised it to *Thomas Cooke* for life, remainder to his child or children by any woman he might marry, and his and their executors, &c. for ever, on condition, if he died an infant unmarried and without issue, then over to his father William Cooke and his three other children, share and share alike, and their heirs, executors, &c. 1. This devise depends on *contingency*; to wit, Thomas Cooke's dying an infant, and leaving neither wife nor child, otherwise, it could

not take effect. Here it failed, as he attained twenty-one, and married. 2. Though the devise of a term to A for life, with a contingent remainder over, will, generally, only entitle A, the first taker, to a life estate, if this remainder fail, and the residue of the term will go to the testator's representatives; yet his intent appearing to exclude his executors, the residue will go to A's widow and next of kin on the statute of distributions; or A will have a power to dispose of it. *And* cannot be read *or* in this case.

CH. 130.  
Art. 6.

See Salk.  
231.—1 L.  
Raym. 325.

§ 16. This was a bequest of a term of years to Thomas B. Peake, the grandson of the testator, "and the lawful heirs of him for ever; but in case he shall happen to die, and leave no lawful heir," then after his death (said Thomas B. Peake) to the next eldest son of Daniel Peake (father of said Thomas B. Peake) and Sarah his wife: held, the next eldest son took the remainder; and leaving no lawful heir, meant leaving none at the time of his death.

2 D. & E.  
720, 721,  
Goodtitle v.  
Pegden; al-  
so 7 D. & E.  
555.

§ 17. A had three daughters, and bequeathed small legacies to B and C, two of them, and a leasehold estate to D, the other; but if she died without having a child or children, then "to B, and after her to her child and children." D had a child, which died in her life time. Held, D took the absolute interest in this term for years: and it was to go over to B only in case D died without having a child.

7 D. & E. 322,  
Weakley v.  
Rugg.

§ 18. Difference between the gift of a chattel to one and his assigns and over if he die not leaving issue living, and a devise to one if he so long lives. As where Thomas Heath had a lease of lands, dated August 12, 1553, for 76 years, and let it to one Blunt from his death to May 1, 1629—3 months less than the lease, if his wife Dorothy lived so long: then he demised that *William Heath, his son, and his assigns*, have the same and reversion thereof, and all interest therein for the residue of the 76 years, not expired at her death: *provided if William died without issue living at his death*, then to his son Thomas, (the plt.'s lessor) for the residue of said 76 years unexpired, from her death, and of William without issue, and if he died without issue to his daughters. Held, the limitation to Thomas was void, being in the nature of a *perpetual* limitation (after several arguments). But the lease to Blunt was valid, Thomas Heath dying within the time, so the devise &c. to William was valid. But the devise to *William and his assigns*, with said proviso, gave him the whole term, and he had power to dispose of it to all intents, and bind Thomas. The law did not expect William to die without issue. And this difference, where a lease is devised to one *if he live so long*, and then to another, the first has but a *qualified estate*, and the other has the absolute interest; but when limited to one and his assigns, then

Cro. Jam.  
469,  
Child v. Bai-  
lie & al.—  
See Palmer,  
333; also  
Norfolk's  
case, Roll.  
Abr. 612.—  
Jones 15,  
Mod. 52.—  
Jon. 15.—  
Lev. 22, 28.—  
Cro. Car. 230.  
—Vern. 224.  
—Pollexfen,  
15 to 50—  
2 Vern. 668.  
—1 Eq. Ca.  
Abr. 362.

CH. 130. the *proviso* added is void to restrain his alienation. And so  
 Art. 6. this case differs from Lampet's case, 10 Co. 46, and 8 Co.  
 96; for as the wife might outlive the term, then William had  
 10 Mod. 403. but a *possibility*, and of course Thomas but a *possibility upon*  
 3 Br. Ch. R. a *possibility*, which is against the rules of law, as in 1. Co. 156.  
 82. And this limitation was the same as after one to William dying  
 without issue. Error was brought, and the above judgment  
 affirmed. See a case, Cro. Jam. 461, which seems to be  
 different, though not clearly so.

1 P. W. 98.  
 Higgins v.  
 Dowler.—7  
 D. & E. 557.—  
 3 Ves. jr. 613  
 9 Ves. jr. 508.  
 —1 P. W. 98.  
 —Salk. 156.  
 6 Cruise, 509.  
 —1 Ves. jr.  
 133, 154.  
 Butterfield v.  
 Butterfield,  
 1 P. W.  
 209.—3 Bro.  
 C. R. 257.—

§ 19. Though a remainder in a chattel or term after an estate *tail* is clearly void, when that estate is vested, yet, if the remainder be limited on a contingency, which does not happen, and so the estate tail never vests, the remainder is valid, for then the remainder over comes seasonably into possession, and no estate vests before it. And see *Wilkinson v. South* and other cases, chr. 114, a. 31, 20, &c. And general words restrained to a limited time by circumstances and intentions, as further, 1 P. W. 534, *Hughes v. Sayer*; Chan. Pre. 528, *Nicholls v. Skinner*; 1 Bay 80, *Keating v. Reynolds*; 1 P. W. 563; *Pinbury v. Elkins*; and 3 Br. P. Co. 257; *Moseley*, 188. See, a. 4, &c. and ch. 114, a. 31.—But general words, as dying without issue &c., will not be restricted to a limited time, as the death of one in being, &c. unless there be something in the expressions that leads to such a construction. Therefore in this case, the testator devised that £400 should be put out on good security for his son Thomas, that he might have the *interest* of it for *his life*, and *for the lawful heirs of his body*, and if he died without heirs, it should be to his son J. Held, the whole vested in Thomas, and the limitation over to J. was too remote, and so void. Here was no intent to be collected to restrain the general expressions.

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*Daw v. Pitt* to the same effect, judgment at the rolls; this reversed, and then affirmed in the house of lords. So *Glover v. Strothoff*, 2 Br. Ch. R. 33, to the same effect. On the same principle was decided *Robinson v. Fitzherbert*, 2 Br. Ch. R. 127. See, also, *Ambl. 362*; *Wilson v. Vansittart*, 4 Br. Ch. R. 542; *Jacobs v. Amyatt*, 2 Br. Ch. R. 570.

2 Ch. R.  
 Pawlett v.  
 Doggett.

§ 20. Devise of money and goods to A for life, and if he die without issue, over—devise over is good.—The first limitation being *expressly* for life, the after words could not enlarge it by *implication*, as they would a real estate, then it is within the common rule, and chancery directs the tenant for life to give security.

1 Roll. Abr.  
 911.—  
 2 Roll. Abr.  
 448.—  
 1 Co. 134.—  
 Cro. El. 658.

§ 21. *Executors take a chattel by purchase.* As if one make a lease to A for 99 years, if he live so long, and if he die within the term, then to his executors or assigns for 40 years, his executors take by purchase if he so die, but if he survive, they

take nothing. The meaning is, if he die before the 99 years expired, they have the term; but as he may live above 99 years, it is uncertain if they have the 40 years' term; so it is contingent and uncertain if it vest at all, so it cannot vest in him. But usually, as heir and ancestor are correlatives as to inheritances, so a testator and executor or intestate and administrator as to chattels are correlatives. And as a remainder to his heirs vests in the ancestor himself where he has a life estate therein; so does a remainder to the executors vest in the testator himself, where he had before an interest limited to him; but as heirs, may be in some cases words of purchase, so may be executors as above.

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*So assigns may be as executors.* As a lease to A, B, and C, for their lives, remainder to the assigns of the survivor for 99 years. B was the survivor; held the 99 years was an interest vested in him, that he might dispose of as he pleased, and not a bare power to nominate assigns, for assigns is a word proper for the limitation of a further interest to the same party in the case of a chattel, as heirs is for the inheritance, and yet both vest in the party himself, for assigns are either in fact or in law, as executors &c.

Yelv. 85.  
Clerk v. Sydenham.

English forms of declarations, pleas, &c. referred to.—Declaration in dower plea, replication, and proceedings, 10 Wentw. 157 to 163.—Index of references notices forms in several English authors, p. 164, 165.—American forms in dower, American Precedents, 312, 313; Story's Pleadings, 349 to 373.

Notes.

## CHAPTER CXXXI.

### ESTATES BY ALIENS.

#### ART. 1. *General principles.*

§ 1. An *alien* owes a *local* allegiance while in the country and is there protected; and he is one born under a foreign allegiance. He may purchase lands and hold them till inquest of office found, and of course till that is done, may hold them, mortgage, sell, or devise them; but he cannot inherit or be inherited, for the law bestows this capacity only upon citizens, native or naturalized. It is generally said, that an *alien* cannot purchase to his own use, but if he purchase, it is to the use of the king, or here to the use of the state government. This is, generally, true, because whenever the king in England, or the State Government here sees fit to take the lands he has

1 Bl. Com.

370, 372.—

1 Salk. 46.—

Doug. 641.—

2 W. Bl. 1324.

—1 Bac. Abr.

84.—

3 Burr.

1741.—

2 Stra. 1062.—

7 Co. Calvin's

case, 1 to 54.

Dyer, 144.—

38 H. VIII.

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## Art. 1.

Dyer 2 b,  
plea 8.—Co.  
Lit. 1, s. 2.

purchased, from him by an inquest of office, it may be done. By the civil law the contract was void. An *alien friend* can acquire *personal* property, or hire a house for his business, or sue for personal property, and he may dispose of it by will. And by our statute of March 12, 1806, above cited, he is intitled to his part of an intestate *personal* estate, and so is he at common law; but an *alien enemy* cannot bring even a *personal* action in his own right, nor can one be brought for his benefit; and if an alien friend, a merchant or trader, in a country, take a house for his habitation and business for years, and leave the country, the king or government has it, on office found, so if he die. Who are aliens, 3 Cruise, 375.

3 Woods'  
Con. 20.  
Godb. 275.—  
Hob. 271,  
Courteen's  
case.  
6 Wood's  
Con. 81.—  
Godb. 192.—  
Noy 137 —  
5 Cruise, 393.

§ 2. An alien may take a *use*, as he can land, by purchase, but he cannot retain either on inquest of office against him.

§ 3. An alien friend, living in England, may be called loving and obedient subject, and if indicted for treason the indictment concludes against the allegiance he owes &c.

§ 4. If land be given to A in tail, who is an alien, it cannot descend to his heir; yet an alien is *seized* till office found. As where an alien suffered a recovery, as tenant in tail, remainder to C in fee, and after office was found. Held, this common recovery barred C of his remainder, and the king had a good fee, for till office found the tenant in tail was seized, and there was a good tenant to the *præcipe*, and so is our law as stated in the American cases in a subsequent article. He cannot be a freeholder, 1 Cruise 11, nor be tenant to uses, 422, nor by the curtesy, 113, nor in dower, 145.

Co. Lit. 7.

2 Bl. Com.  
249, 254.

§ 5. In England, "the issue of one made a *denizen* shall inherit the father, though he have an elder brother alive, born while the father was an alien; for *denization* has not such retrospect as *naturalization*, which makes a man a natural subject *ab initio*; but a *denizen* derives his very essence, as a subject, from the denization; and his son born before never had any more right to inherit, than if he had not been his son at all.

Co. Lit. 32,  
33.

§ 6. "If the husband of an alien sell his lands and then she be made a *denizen*, she shall not be endowed; for an alien has no more title to dower than if she were never married." But if she be naturalized she shall have his dower of lands he sold after the marriage, and before the naturalization, "for thereby she became a natural subject *ab initio*. A title may be derived through an alien. 3 Cruise, 377.

3 Salk. 29.—7  
Co. 1, 56.—  
1 Cruise, 113.  
—1 Vent. 417.

§ 7. So an alien cannot be a tenant by the *curtesy* nor can he have a chattel real, except a merchant for his trade.—In short, an alien has no freehold or chattel real by provision of law, but if he purchases the land or use, the law indulges him in the seizin and enjoyment of them till office found, and in the enjoyment of the leasehold estate he hires for the purpose of his merchandise.

§ 8. Alien enemy is a good plea, and if he has any protection, he ought to reply and shew it, whether it be general or special. Farr. R. 150, Sylvester's case.

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§ 9. It is law in England, that monies cannot be remitted from that country to any alien enemies without a license from the Secretary of State; but it is also law there, that the plea of *alien enemy* in a personal action, is merely for delay, and does not affect the merits. This was in an action brought by the plt. on a policy of insurance he caused to be made in trust for *alien enemies*.

8 D. & E. 71.  
Simeon v.  
Thompson.—  
6 D. & E. 23.

§ 10. Aliens may be executors and administrators, and an *alien enemy* may sue in *auter droit*. Wells v. Williams, Salk. 46.

1 Wooddeson, 370, 381.

§ 11. The reasons usually given for not allowing aliens to hold lands are, 1st, They might discover the secrets of the nation: 2. Carry their revenues out of it: 3. They might fortify themselves in the heart of the country: 4. Aliens born cannot be jurors, and yet they might get large portions of land; and according to Wooddeson, an alien cannot be even a constable.

Calvin's case,  
7 Co. 36.—  
Wooddeson,  
378.

§ 12. In this case, A the father and B the son were Spaniards, and went to England, and, 4th of Elizabeth, the father was made a *denizen*, and afterwards had another son C, born in England; 40th Elizabeth A died, and 3d James B was naturalized and purchased land, and died without issue; and it was resolved that C should inherit the land, for there needed no blood from the father, for the land came not from him.

Cro. Jam.  
539,  
Godfrey v.  
Dixon.

§ 13. An alien cannot be trustee, or seized to the use of another, for he cannot be decreed to execute it. And if an alien purchase lands in the name of a trustee, the king must sue in *chancery*, to have the trust executed; he cannot have an inquisition, for the legal estate is in the trustee. And an alien cannot enforce the execution of a use at common law, or of a trust now. If an alien and a subject purchase jointly, they are *joint tenants*, and the survivor shall hold till office found, for till office found the alien is seized.

1 Com. D.  
415.—  
1 Co. 127.—  
1 Rol. Abr.  
194.—Hard.  
496.—Al. 16.  
5 Co. 52.—

In a New York Chancery Court it has been decided, that an *alien enemy* allowed to remain in the United States, or one brought here as a prisoner of war, may sue for his rights; and that he does not forfeit his rights of property. A suit against one commenced and not abated in the war, is valid after. 2 Vol. 508.

1 Johnson's  
Chancery  
Reports, 208.

ART. 2. *Who is an alien &c.* § 1. Henrietta, a British subject, went to Flanders, and there married one Count Durose, an alien, by whom she had the plt., there born in 1763; and the court held the plt. was an *alien*, and therefore could not inherit his mother's estate in England. But by 4 Geo. II. c. 21. if an Englishman go to France &c. and there marry a

4 D. & E. 300,  
Doe v. Jones.  
—1 Cruise,  
375.—Doug.  
650.

CH. 131. French woman, and there have a son, this son shall inherit  
 Art. 2. his father's estate in England ; and so this son, though born  
 in France, was not an alien. See below.

Acts of Con-  
 gress.

§ 2. By the Acts of Congress of March 26, 1790, and  
 January 29, 1795, an alien father being naturalized, his children under twenty-one years of age, dwelling in the United States, cease to be aliens and become citizens. Citizens of the United States having their children born beyond sea, are as natural born citizens. But this right of citizenship is not to descend to persons whose fathers never have been resident in the United States.

7 Co. 1 to 56,  
 Calvin's  
 case.

§ 3. In this case of Calvin is contained most of the essential principles of law respecting aliens. Page 31, Coke describes an alien thus : " An alien is a subject born out of the allegiance of the king, and under the legiance of another ;" and is one, who can have no real or personal action concerning land. Page 33, " Every man is an alien born, [*alienigena*] or subject born, [*subditus*]. Every alien is a friend, that is, in league &c., or an enemy, that is, in open war &c. Every alien enemy is *pro tempore*, or *perpetuus*, or *specialiter permissus*. Every subject is *natus*, (born) or *datus* (given or made.) An *alien friend*, or any one whose government is at peace with ours, " may, by the common law, have, acquire, and get within this realm, by gift, trade, or any lawful means, any treasure, or goods personal whatever, as well as an Englishman, and may maintain any action for the same : " but he cannot acquire, get, or maintain any action as to lands, or houses, but for his necessary habitation. But if he become an enemy, then he is disabled to maintain any action, or to acquire any thing within the realm.—Page 35, If the king's ambassadors in foreign nations have children born there, of their wives, being Englishwomen, by the common law of England, they are natural born subjects ; they are born without his dominions, but within his allegiance. " If an enemy seize hostilely a fort in the king's dominions, and there have issue, that issue is alien ; for though born within the king's dominions, he is not born within his allegiance or obedience."—Page 36, " One cannot be a subject of the king of England, unless at the time of his birth he was under the allegiance and obedience ; " therefore, men born in Scotland before the union of the two crowns in James I. are aliens as to the king of England.—Page 38, Men of countries under the same allegiance are not alien to each other, though under different codes of laws ; therefore, a man born in Gascoin in France, when Gascoin was under the allegiance of the king of England, was no alien born as to lands in England, though the king held Gascoin and England by distinct titles, and each place was governed by its

own distinct municipal laws, and though Gascoin was out of the extent of the great seal of England. There was the same rule of law as to Calais, Wales, and other places under the allegiance of the king of England, but no part of England. Same as to Ireland, when Ireland was governed by its own laws and customs, and is out of the realm of England. The same of Scotland and Berwick.—Page 48, General rule, all born under the same allegiance can inherit and hold lands in all the territories subject to that allegiance, as in all the Roman dominions.—Page 53, 54, The union of two sovereignties, or the division of a nation, does not affect the titles to lands of those previously born. Hence the *antenati*, or men born in Scotland before the union of the crowns of Scotland and England in James I. remained alien to England, because they were born when there were several kings of the several kingdoms, and the uniting the kingdoms by descent *subsequent*, cannot make him a subject to that crown to which he was born an alien, at the time of his birth. So if the two kingdoms should by descent be divided and governed by several kings, yet those born under one obedience while the realms were united under one sovereign, should remain natural born subjects, and no aliens; for that naturalization, due and vested by birth-right, cannot, by any separation of the crowns afterwards, be taken away; nor he that was by judgment of law a natural subject at the time of his birth, become an alien by such a matter *ex post facto*. If it be here intended they remain subjects as to rights *previously vested*, there is no difficulty in understanding Lord Coke; but if he means they remain subjects as to rights to be acquired *after* the separation, his doctrine is not understood, or is not to be supported. His principle as to vested rights is agreeable to the case of a conquered country, and to the rule established in the United States in their separation from Great Britain, July 4, 1776. Our principle has ever been, that estates, previously vested in the subjects of Great Britain, were not divested by the separation of one part of the nation from the other, but as to these they remained subjects, and so of estates in England owned there by Americans. But that by the separation, July 4, 1776, the subjects of Great Britain became so far aliens to the United States, as not to be capable of taking, after such separation, any estates in the United States, by *descent*.

§ 4. If an alien, immediately after his birth, come into England, and there continue all the time afterwards, this does not make him a denizen. 1 Com. D. 419.

§ 5. "As the law allows an *alien enemy* to be an executor, and possess the effects of the testator, as well as an alien Imp. M. F. 47, cites Coke Lit 129.

CH. 131.  
Art. 2.

CH. 131. friend, it must allow him power to recover," and of course to  
 Art. 2. sue for them.

§ 6. In this case it was held, that a bastard, born of English parents in Tournay beyond sea, but a place under the dominions of the crown of England, was a liege subject in England, and could inherit lands there; and the court said, his situation was the same as would be that of a Frenchman, husband and wife, who should come into England, stay there, and have issue there. Such, by his being born in England, would be a liege man, though his parents were aliens.

25 Ed. III.  
 Stat. 2.

§ 7. This act, adopted in the British colonies as to alienage, enacted that, "all children inheritors, which from thenceforth should be born without the legiance of the king, whose *fathers and mothers* at the time of their birth, were and should be at the faith and legiance of the king of England, should have and enjoy the same benefits and advantages *to have and bear the inheritance*, within the same legiance as the other inheritors aforesaid, in time to come; so always that the mothers of the said children do pass the sea by the license and wills of their husbands." This statute includes all children born in foreign countries of citizen parents, so that such children are not aliens as to estates whenever such parents retained their British, and in our cases, their American legiance. In *Doe v. Jones*, 4 D. & E. 302, Marryat, counsel for Durouse, said, the construction of this act had ever been in the disjunctive *or*; so that if either father *or* mother be a natural born subject, the child is entitled to inherit to that one who was natural born:" and cited *Rex v. Eaton*, E. T. 1790; *Bacon v. Bacon*, Cro. Car. 601; 1 Bac. Abr. 77; 2 Ven. Abr. 171; and *Collingwood v. Pace*, 1 Vent. 422. But in these cases the *husband* was an *Englishman*, and the *wife* only an *alien*; and then the wife being *sub potestate viri*, both are viewed as under the king's legiance.

4 Geo. II. c.  
 21.

§ 8. This act, passed to explain 7 Anne, c. 5, enacted, that "all children born out of the king's allegiance, whose *fathers* are natural born subjects, shall be deemed to be natural born subjects." This explains both 25 E. III. & 7 Ann. 4 D. & E. 308, Lord Kenyon said, that "the character of a natural born subject, anterior to any of the statutes, was incidental to birth only; whatever were the situations of his parents, the being born within the allegiance of the king, constituted a natural born subject;" and thought the 25 E. III. meant to confer *all* the rights of natural born subjects, and not merely those only as to inheritance. And the 13 Geo. III. c. 21, extends the privilege to grandchildren, but confines them to the *paternal* line. On the whole, there seems to be no doubt but the above decision in *Doe or Durouse v. Jones*, was correct; and hence

25 Ed. III. must be read fathers *and* mothers. And now if an American citizen go abroad and marry an alien wife, and have a child by her in a foreign country, that child is not an alien, but may inherit his estate in the United States. But if an American woman, a citizen, go abroad and marry an alien husband, and have a child by him, so born, that child is an alien, and cannot inherit her estate in the United States. And upon the same principles, if an English subject comes into the United States, and marries an American wife, and has a child by her born here, it cannot inherit her estate here : because this child follows the allegiance of its father, and may inherit his estate in England.

CH. 131.  
Art. 3.

§ 9. In this case of a personal action, the plt. an *alien amy* when he commenced it, but becoming an *alien enemy* pending it, the court held, he was barred on the whole record, though the plea of alienage was badly pleaded ; because not pleaded in bar of the *further maintenance* of the action, but in bar of it generally.

4 East, 502,  
Le Bret v.  
Papillon, A.  
D. 1804.

§ 10. But there are cases in which an *alien enemy* may maintain a personal action. As when the British king licensed a certain trade with an *alien enemy*, for specie and goods brought from an enemy's country (Cuba) to Nassau &c. in his ships, A. D. 1806, the plt. got insurance on the alien's ship and cargo for him, and recovered—the court deemed the voyage was incidentally legalized. In this case the plt. in error, the underwriter, cited *Brandon v. Nesbitt*, and *Bristow v. Towers*. The court thought the king's license could not remove the alien's disability, and enable him to sue in his own name, yet it purged the trust of the plt. in this case of the objections made in those cases, as here is no public interest in the way of this suit.

8 East, 273,  
Kensington  
v. Inglis & al.

§ 11. As to several actions by aliens, see Ch. 3, a. 2, alien plts. According to this author "the issue of an alien born within the realm of England are natural born subjects" there. And "the property of an alien resident abroad, consisting of stock in the public funds or other personal effects in England, is subject to the control of the Court of Chancery." "But if an alien resident abroad dies intestate, his whole property is distributable according to the laws of the country where he resides."

1 Woodde-  
son, 384,  
386, cites  
Salk. 19.

#### ART. 3. *Our treaties as to estates by aliens.*

§ 1. The United States have made several treaties which enable aliens to hold real estates in them. The first treaty of the kind was that with France of Feb. 6, 1778. See this stated Ch. 3, a. 2 ; and 2 Wheaton's R. 270.

French Trea-  
ty of 1778.

§ 2. The next was our treaty of peace with Great Britain in 1783 ; by the fourth article it was "agreed that creditors

Treaty of  
Peace of  
1783. Ware  
v. Hylton, 3 Dallas, 199 to 285.

CH. 131. on either side shall meet with no lawful impediment to the recovery of the full value in sterling money of all *bonâ fide* debts heretofore contracted." And held, British debts were not confiscated in South Carolina in the revolution, and by Georgia not, but only *sequestered*, so revived by the peace as well as by this treaty.

Mass. S. Jud.  
Court, Wor-  
cester April,  
Term, 1808,  
Moore & al.  
v. Patch.

§ 3. In this action it was the opinion of the court, that to enable a British creditor to have the full benefit of this provision in this treaty it was necessary to construe it so as to enable him to take the lands of his American debtor in execution, and hold the same in fee simple to satisfy such debts. The case was, James Putnam Esq., an absentee, left this country during the revolutionary war, and went to and resided in the British dominions, and so became an alien. After the treaty of peace he sued Patch, the deft., as executor of the will of Nathaniel Adams, to recover a debt Adams before the war contracted with said Putnam, and got judgment by default, and levied his execution on the land in dispute, and leased to Patch by parol; he refused to quit, and had obtained a quit-claim from the heirs of Adams. Pending the lease, Putnam conveyed to David Moore, the ancestor of the demandant. Judgment for them; and this land is now held under this alien title. But what is an American's right under this article in England? Not to levy on real estate.

§ 4. The next treaty on this subject was the British treaty of November, 1794, which see stated and explained, Ch. 3, a. 2. Under these several treaties many lands are held in the United States by aliens, or under their deeds or devises of them, or by descent from them.

§ 5. The next, the convention with France of Sept. 1800, containing a provision like that of 1778; this of 1800, continued in force eight years. Rights vested under it did not divest. The case of *Chirac v. Chirac*, 2 Wheaton's R. 259, was this: the French father before 1798, when the French treaty of 1778 was abolished, acquired a title in fee to lands in Maryland under that treaty. He died in 1799, after it was repealed, leaving his heirs at law aliens to the United States and resident in France, and then there was no treaty in force to enable them to inherit his lands in Maryland; but in 1780, Maryland had passed a law by which on his death they took a conditional fee. When the said convention was made, September 1800, it converted, as the court held, this conditional fee into an absolute fee, without their performing the condition; and thereupon they recovered in ejectment against a title by *escheat* set up by the State. And though that convention expired in 1808, yet titles vested under it were not divested on its expiration.

*Chirac v.  
Chirac.*

§ 6. Held, an alien may take a freehold estate by purchase. **CH. 131.**  
 This cannot be divested on the ground of alienage, (he can **Art. 4.**  
 take money arising from land sold under a will, Ch. 225, a. 6, s. 13) except by inquest of office or act of government that is  
 equivalent. And a defeasible title thus vested in the war of  
 the revolution in a British born subject ever remaining an alien  
 to the United States, is confirmed to him by the ninth article  
 of the British treaty of 1794. This was a case in chancery.

3 Wheat. R.  
 594, Craig &  
 al. v. Rad-  
 ford.

§ 7. Error to the Court of Appeals in Virginia in ejectment  
 brought to recover the waste lands called the *Northern Neck*,  
 formerly owned by Lord Fairfax, and at his death he had the  
 absolute title, and property, and possession. He was a citizen  
 of Virginia, and in 1781, devised said lands in fee to Denny  
 Fairfax by the name of Denny Martin. He was a native born  
 British subject and an alien enemy, always residing in Eng-  
 land. Held, though such enemy, he took the estate under the  
 devise : held 2. He could hold them until office found : 3.  
 That Virginia could not grant them till her title should be per-  
 fected by possession : and 4. That the British treaty of 1794,  
 confirmed said devisee's title.

7 Cranch,  
 603, Fairfax's  
 Devisee v.  
 Hunter's  
 Lessee.

**ART. 4. American statutes on this subject.**

§ 1. These passed by Congress and the several States are  
 very numerous ; many to confiscate the estates of conspira-  
 tors and absentees become aliens in the American revolution,  
 on which many questions have arisen ; but these acts, so far  
 as they respected those descriptions of persons, will in a few  
 years become of not much importance ; as well also, the very  
 numerous acts passed by the several State legislatures for na-  
 turalizing particular persons, and thereby enabling them to  
 acquire and hold estates here, though once aliens. With regard  
 to confiscations of the estates of those who became aliens in the  
 American revolution, the numerous statutes passed in the sever-  
 al States were generally of two kinds : 1. Those that confiscated  
 their estates in fact, and declared them aliens without any  
 judicial process : 2. Those which described what descriptions  
 of persons should be deemed aliens and their estates confis-  
 cated by judicial process. Of the first kind was the act pass-  
 ed by the legislature of Massachusetts, April 30, 1779. This  
 act named about thirty persons who had been king's officers  
 in the province, and stated they had wickedly conspired to  
 destroy its constitution of government as established by char-  
 ter, and to reduce its inhabitants under the absolute domina-  
 tion of the king and parliament of Great Britain ; and then  
 declared they had "renounced and lost all civil and political  
 relation to this and the other United States of America," and  
 that they should "be considered as aliens," and "that all their  
 goods and chattels, rights and credits, lands, tenements, and

2 Mass. L.  
 1053, 1055,  
 Conspirators.

## CH. 131.

## Art. 4.



hereditaments of every kind, of which" any of them were seized or possessed, or were entitled to possess &c. in their own right, or whereof any other was seized or possessed &c. to their use, should *escheat* to the sole use of the government and people of the State, and so by the act itself actually vested the property in them without further inquiry or adjudication, but this act was confined to the estates they had after April 19, 1775. Their debts were to be paid, and their wives and widows remaining in the United States to have their thirds out of their estates real and personal for life, and continuance in said States, and dower to be set off as if the husbands "had died intestate, and liege subjects of this State." Here dower accrued on a civil death, also the act made provision for some poor relations out of these estates. In these cases the statute itself was an actual confiscation, the legislature tried and judged without any parties before them—the natural consequence of a revolutionary state. These owners were declared aliens, and their estates by a legislative act actually vested at once in the government and people. Of the second description was the act passed as to absentees. This act recited, that about 330 persons by name, and many others had left this State or some other of the United States and joined the enemies thereof, depriving them of their services when they ought to have aided in defending them against the invasions of a cruel enemy, then enacted, that if they or any of them voluntarily returned to this State they should be apprehended, carried before some justice of the peace to be committed to prison, there to be "in close custody" till he should be sent out of the State in a certain manner prescribed, and then the act made it death if they again returned without permission.

Mass. Act,  
1778,  
Absentees,  
C. & P. 818  
to 824.

§ 2. This act was passed for confiscating the estates of said absentees, and enacted that every inhabitant of any of the Colonies who after April 19, 1775, "had levied war or conspired to levy war against the government and people of any of the said Colonies or Provinces, or United States; or who hath adhered to the said king of Great Britain, his fleets or armies, enemies of the said Provinces or Colonies, or United States, or hath given to them aid or comfort; or who since the said 19th day of April 1775, hath withdrawn without the permission of the legislature or executive authority of this or some other of the said United States from any of the said Provinces or Colonies, or United States, into parts or places under the acknowledged authority and dominion of the said king of Great Britain, or into any parts or places within the limits of any of the said Provinces or Colonies, or United States, being in the actual possession, or under the power of the fleets or armies of the said king; or who before the said 19th day

Mass. Act,  
April 30,  
1779.

of April 1775, and after the arrival of Thomas Gage Esq. (late commander in chief of all his Britannic Majesty's forces in North America) at Boston, the metropolis of this State, did withdraw from the usual place of their habitation within this State into the said town of Boston, with an intention to seek and obtain the protection of the said Thomas Gage, and of the said forces, then and there being under his command; and who hath died in any of the said parts or places, or hath not returned into some one of the said United States and been received as the subject thereof, and, if required, taken an oath of allegiance to such States, shall be held, taken, deemed, and adjudged to have freely renounced all civil and political relation to each and every of the said United States, and be considered as an alien." By the second section it was declared their estates *escheated* and enured to the government. And the third section provided judicial process by information &c. in the nature of an inquest of office, in order to have their property adjudged forfeited, and confiscated accordingly, and seized to be vested in the State &c. And it has been decided by our Supreme Judicial Court that this act could not operate, *ipso facto*, to disfranchise a citizen and make him an alien without a trial and conviction, but that in order to make him an alien and lose his estate, it was necessary he should have been prosecuted before the treaty of peace, and adjudged within the act &c. See the cases of *Kilham v. Ward & al.*, and *Gardner v. Same*, stated Ch. 3, a. 2. The distinction taken in these cases was, that if any of these absentees who left the Colonies after the commencement of the revolutionary war, and resided in the territories of the king of Great Britain, did return to said Colonies or United States and take up a permanent residence therein before the treaty of peace of 1783, he continued to be a citizen and did not become an alien: but if such absentee remained in the British dominions voluntarily till that treaty was made, which has been thought by some to fix the conditions of the parties, then he became an alien; therefore Downer was adjudged to be an alien, as stated in Ch. 3, a. 2.

The judicial process was had against a number of real estates of these persons, and they were adjudged forfeited, and vested in the State; their personal estates were actually confiscated by the act itself, and there was no proceedings against them provided for. This and several other parts of the act were not very consistent with an after inquiry, if these persons were within the act adjudged to be necessary by the Supreme Judicial Court, as above stated. And the seventh section of this act made the same provision for the wives and

CH. 131.  
Art. 4.

2 Mass. R.  
236.

CH. 131. widows of these absentees that the other act made for the wives and widows of conspirators.

Art. 4.



§ 3. Several other acts were passed before April 30, 1779, and after and before the treaty of peace, for taking possession of and appraising the estates of the conspirators and absentees, and for disposing of them to pay their debts and for the benefit of the State, none of which appeared to contemplate that a conviction was necessary to bring the absentee within the law, and this specially appeared in regard to those of them who died in the British dominions in the war. The act of New York of October 22, 1779, attainted sundry persons of the offence of adhering to the enemies of the State, and by this act each person so attainted forfeited "all his estates real and personal, held or claimed by him, whether in possession, reversion, or remainder, and also all estates and interest, claimed by executory devise or contingent remainder." None of these words extended to a condition.

Gould's case,  
Essex.

In several cases the judgments of confiscation have been reversed by writs of error, and the form of proceeding against the real estate of an absentee was predicated on the ground, that he had "renounced all civil and political relation to each and every of the United States of America, and had become an alien, and that certain real estate of the said — situated in — ought to *escheat*, and enure, and accrue to our sole use and benefit;" that is of the State.

1 Mass. R.  
256, Sheafe  
& O'Neil.

§ 4. Though an alien cannot hold lands in this state *after office found*, for that moment they become vested in the Commonwealth, yet *before office found*, he may hold them against all except the Commonwealth; and he can grant them, and his grantee can maintain an action to recover the same, and may declare on his own seizin in fee. In this case one James O'Neil, May 25, 1799, mortgaged the premises to the plt. There was a plea in bar, that when the said deed was made, O'Neil was an *alien*, and not within the allegiance of this Commonwealth, or of any of the United States, but born in Ireland, within the united kingdom of Great Britain and Ireland, &c. On demurrer, the plea was held bad.

2 Mass. R.  
179.

§ 5. And though an *alien* cannot inherit, yet a natural born citizen may make title through an alien ancestor, as in virtue of the 11 & 12 W. III. adopted here, as stated Ch. 3, a. 3, in *Palmer & ux. v. Downer*.

1 Mass. R.  
347 to 400,  
Martin v.  
Common-  
wealth in  
error.

§ 6. This was a writ of error on a judgment of the Inferior Court of Common Pleas, rendered 1781. And it was held, among other things, that an estate of a *feme covert* was not liable to be confiscated, under the *absentee act*, above stated; because she could be guilty of no offence within that act, being *sub potestate viri*. Dana C. J. said, the words of the statute

ere general, "*femes covert*s are not named; if the statute tends to them, it must be by implication. The statute does not charge a crime. Every person had a right to take which he pleased in the contest in which we were then engaged;" and "*femes covert* having no will, could not incur the forfeiture" of her property holden of the State by withdrawing with her husband.

CH. 131.  
Art. 4.

§ 7. But it will be observed, that the court in *Kilham v. Vard & al.* thought this statute grounded on *criminality* in those who incurred the penalties and forfeitures of it; and therefore a *conviction* was essential to fix the guilt &c.

§ 8. This was a writ of error in the county of York, to reverse a judgment rendered there in the Supreme Judicial Court, October Term, 1805. And it was held, that an information or inquest of office under *the Conspirator's Act*, passed April 29, 1779, must describe the estate claimed, and the title set up to it by the Commonwealth; must allege the conspirator was seized of the land demanded *in his own right*; and also, that he was seized between April 19, 1775, and the date of the act:—and such an information may be filed in a different county from that where the land lies, and the summons be made returnable in the latter county.

2 Mass. R.  
284, *Cutts in  
error v. Com-  
monwealth.*

§ 9. This was a writ of right &c., and three points were decided: 1. That a writ of possession was not necessary to complete a judgment in favour of the State, in prosecutions under the acts against absentees: 2. If a judgment of confiscation under the absentee laws was rendered after the treaty had declared that no future confiscations should take place, such judgment is valid, unless reversed by a writ of error: 3. The laws made against conspirators and absentees before the adoption of the constitution of the Commonwealth, are not repealed by the declaration of rights prefixed to the constitution. In this case the tenant claimed under Richard Chamberlain, who vouched in Joshua Woods, who vouched the heirs, executors, and administrators of Samuel Conant, deceased, who vouched in the Commonwealth, which appeared by the Attorney and Solicitor General, pursuant to a resolution of the Legislature. In this case M'Neil, the ancestor, remained in Boston with the British troops before March 1776, and then left Boston with them, and remained in the *British* dominions till he died, after the peace; and there seems to have been no doubt but that he became an *alien*, though there could be no conviction.

4 Mass. R.  
282, *M'Neil  
v. Bright & al.*

§ 10. This was an inquest of office on the statute of 1791, c. 13. In this James O'Neil, a British *alien*, before Jay's treaty of November 1794, purchased the land of Abigail and Moses Lyman by a regular deed, and O'Neil died an *alien*.

6 Mass. R.  
441, *Commonwealth  
v. Sheafe.*

CH. 131. After that treaty was made, he mortgaged to Sheafe, in fee, to secure a debt; and on judgment, he entered for condition broken, and held O'Neil was protected by that treaty. Hence a treaty made by the President and Senate of the United States, repeals the laws of a State as to titles to lands in fee simple.

9 Mass. R.  
363, Sewall  
v. Lee.

§ 11. It was decided in this case, that the plea of *alienage*, not being an alien enemy, in a real action, is only in *abatement* to the demandant's disability to sue. The tenant, by not pleading her disability to sue, has admitted her right to sue for her dower.

9 Mass. R.  
377, Martin  
v. Woods.

§ 12. This was a writ of entry in the *quibus*, in which the demandant counted on his own seizin within thirty years and a disseizin by the tenant. Held, the demandant's *alienage* must be pleaded in abatement. Estate of tenant for life being vested in the State, all his right was sold by it. After his death, and within five years after the purchaser's death, the reversioner entered on his heir, tenant at sufferance. Held, his entry was lawful.

#### ART 5. *Naturalization of aliens.*

§ 1. Whether it has been good or bad policy in the United States to naturalize aliens as freely as they have, is not a proper subject of enquiry in this place. There have been different opinions on the subject, not only among different men, but among the same men at different times. There were no naturalizations in the colonies before the revolution, but such as took place under acts of the British Parliament. Though the mass of population in the British colonies was from the British dominions in Europe, so not aliens here, yet many were aliens from early times, who came to the colonies from France, Germany, and other places. As people were wanted in a new country, they were allowed to purchase lands, hold and convey them as they could, on the principles of the common law, till office found; and it was very rare that an office ever was found. Most of them were respectable, or industrious Protestants, driven from Europe by Catholic persecutions, and of course generally received here with open arms. They not only purchased lands, sold, or devised them, but when they died intestate, some how or another, they were allowed to transmit them to their heirs, even before the 11 & 12 W. III. which extended to all subjects within the king's realms and dominions, and enacted, that all persons being *natural* born subjects of the king, may inherit, and make their titles by descent from any of their ancestors, lineal or collateral, although their father or mother or other ancestor by, from, through, or under whom they derive their pedigrees, were born out of the king's allegiance, as fully as if such father, mother, or

11 & 12 W.  
III.

other ancestor had been naturalized, or a natural born subject. CH. 131.  
This act speaks only of *natural born*, not of *naturalized* sub- Art. 5.  
jects. So that one *naturalized* cannot bring his case within  
this act. ~~~~~

§ 2. It seems the judgment of the court, admitting the alien to become a citizen, is conclusive, that all the prerequisites have been complied with: 2. That it need not appear by the record that all these have been complied with: 3. Parol proof is admissible to aid the record; decided on a policy warranting the property *American*. 7 Cranch, 420, 423, Stark v. Chesapeake Ins. Co.; see 6 Cranch, 268, 273.

§ 3. After this act was passed and adopted here, many descents took place. As from governor Bowdoin's ancestor (an alien, a French protestant) to him, though this ancestor came into the country an alien, and remained one, as the British government did not, and the colony, under the king, had no power to naturalize him, and thereby give the king a subject. Bowdoin's case.

§ 4. So Mrs. Fleuker, of Boston, became an *alien* by the revolution; Mrs. Knox, her daughter, being a citizen, holds her estate; but Mrs. Harwood, another daughter, being an *alien*, is excluded. This case, now well settled, proves two points: 1. That a citizen can take and hold lands by descent from an *alien* parent: 2. If that parent leave two daughters, and one is become an *alien*, she inherits no part, and is as if she were naturally dead, as to her parent's inheritance. Fleuker's case.

§ 5. So the Germans who came from Germany and settled at Waldoborough, about A. D. 1750, were and remained *aliens*, yet their children, &c. inherited their estates. Waldoborough case.

§ 6. Hart was a tenant in tail in Lynn, and became, in the revolutionary war, an *alien* and absentee; and his sons being *aliens*, it was decided his daughter, being a citizen, took his estate. It has been urged by counsel that the 11 & 12 W. III. if adopted here, extended only to *ancestors alien born*; but our court has held, the reason and principles of it extended also to those who *became aliens*; as in the cases of Hart and of Mrs. Fleuker. In these cases, as also in Downer's, it was argued and agreed, that Downer, Mrs. Fleuker, and Hart, at common law, if aliens, had no inheritable blood in them; and could no more be *represented* by their children, than they could inherit. 1 Bac. 80. But it was argued and adjudged, that by the statute an *alien* may be represented, or that the citizen or subject may rather claim from, by, or through him. Hart's case.

§ 7. Upon this ground, that an alien cannot, at common law, be represented, arise many nice distinctions, and difficult questions, no longer of importance. By that law the grand- Sid. 193, 198.  
—Vent. 413  
to 429.—3  
Salk. 129.—1  
Jam. 639.  
Bac. 80.—2 Bl. Com. 250, 254, 255.—Cro.

CH. 131. son cannot inherit the grandfather, when the father is an *alien* ;  
 Art. 5. as by that law the inheritor must claim in no part through  
 ~~~~~ *alien* blood, and in no case can he claim from an alien.

§ 8. It will be observed, on attending to the acts of Congress on this subject, that the opinion against naturalizing aliens has been gaining ground in the United States. Before the Federal Constitution was adopted, and so before Congress had any power to naturalize, but by treaties, the several State Legislatures naturalized almost all the aliens that applied for the purpose. In many cases no time of residence was required, and but very little evidence of moral character.

Act of Congress, March 26, 1790.


§ 9. By this act, "any alien, being a free white person," who had resided within the limits and under the jurisdiction of the United States two years, might "be admitted to become a citizen thereof, on application to any common law court of record in any one of the states wherein" he had resided one year, proving himself of a good moral character, and taking the oath to support the Constitution; then there is provision as to children, before stated. Thus an alien, on two years' residence, might be naturalized, and this law was passed by a Federal Congress.

Act of Congress, January 29, 1795.

§ 10. This act was passed to carry into effect the power Congress had by the constitution, which was to establish a uniform rule of naturalization throughout the United States. By the act it was enacted, that an alien, desirous of becoming a citizen, should have declared on oath before the courts named, three years at least before his admission, that it was *bonâ fide* his intention to become a citizen of the United States, and renounce for ever all allegiance and fidelity to any foreign prince, &c. : 2. To declare on oath, when admitted, he had resided in the United States five years at least, and one year in the State &c. where naturalized; to support the Constitution—doth renounce, &c. : 3. The court to be satisfied of the five years' residence, and that he had behaved as a man of good moral character, attached to the principles of the Constitution &c. : 4. To renounce titles of nobility. If resident in the United States when this act was passed, he was admissible on the terms of the former act. Same provision as to children as in the former act, and as to absentees.

Campbell v. Gordon & ux.

§ 11. It will be observed, that though this act of 1795 was also passed by a Federal Congress, yet it very much increased the restrictions on the naturalization of aliens, by requiring five years' previous residence instead of two, and doubling nearly the expenses of naturalization. Construction of this act as to a minor &c. 6 Cran. 176, 183. A competent court certifies an alien has taken the oath; this raises a presumption, it is satisfied as to his moral character and attachment to the

principles of, &c. : 2. The oath when taken confers the rights CH. 131.
 of a citizen : 3. His minor children were also naturalized if Art. 5.
 dwelling in the United States on April 14, 1802 ; though not
 when he was naturalized. 

§ 12. By this act an alien, to be naturalized, must have Act of Con-
 declared on oath before the proper court, State or Federal, gress, April
 three years at least before his admission, that it was *bonâ fide* 14, 1802.
 his intention to become a citizen of the United States, and to
 renounce forever all allegiance &c. : 2. To declare on oath,
 when admitted, he will support the Constitution of the United
 States, and "doth absolutely and entirely renounce and abjure
 all allegiance and fidelity to every foreign prince, potentate,
 state, or sovereignty whatever," and particularly by name the
 prince he was before subject to : 3. The court to be satisfied
 "that he has resided within the United States five years at
 least," and in the state or territory where naturalized one
 year ; and the same as to moral character as in the former
 acts, so as to attachment to the principles of the constitution :
 4. To renounce all titles of nobility and hereditary titles, &c.
 But no alien enemy to be naturalized ; but any alien resident
 in the United States January 29, 1795, may be admitted on
 the terms of the act of 1790, and one so resident between
 January 29, 1795, and June 18, 1798, could any time be-
 fore April 14, 1804, be admitted on two years' residence.
 But in order to be naturalized, every alien arriving in the
 United States after April 14, 1802, if of age, to report him-
 self, or if not of age, or held in service, to be reported by his
 parent &c. to the clerk of the District Court &c., or some
 other proper court, stating his name, birth-place, age, nation,
 and allegiance and country whence come, and his intended
 place of settlement—clerk to record the same and give a cer-
 tificate &c. This act further enacts, that "the children of
 persons duly naturalized under any of the laws of the United
 States, or who, *previous* to the passing of any law on that sub-
 ject by the government of the United States, may have become
 citizens of any one of the said States, *under the laws thereof*,
 being under the age of twenty-one years at the time of their pa-
 rents' being so naturalized, or admitted to the right of citizen-
 ship, shall, if dwelling in the United States, be considered as citizens
 of the United States." This clause sanctions naturalizations
 by an *individual* State *before* Congress passed any laws on
 the subject, but not *after*, and so far tends to settle the long
 agitated question, whether a State government has had any
 power to naturalize aliens, since Congress passed laws on the
 subject. As to children born abroad and absentees, the pro-
 vision is the same as in the former acts.

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Art. 6.

Act of Congress, July 6, 1798.

Act of Congress, March 26, 1804.

Act of Congress, July 6, 1812.

§ 13. Then an act was passed for sending aliens out of the United States in cases of war with, "or any invasion or predatory incursion shall be perpetrated, attempted, or threatened against the territory of the United States by any foreign nation or government," of which such aliens are members, if males fourteen years of age, or for restraining or confining such.

§ 14. This act enacted, that an alien residing in the United States between June 18, 1798, and April 14, 1802, and continuing so to reside, may be admitted &c., without complying with the first condition specified in the first section of the act of April 14, 1802: and that if any alien who had complied with that condition, that is, declared in court his intention &c. died before admitted to citizenship, his widow and children should be considered as citizens &c., and entitled to all the rights and privileges of such.

§ 15. This act enacted, that nothing in the *proviso* contained in the act of July 6, 1798, "shall be construed to extend to any treaty, or to any article of any treaty which shall have expired, or which shall not be in force at the time when the proclamation of the president shall issue." That *proviso* secured to aliens any rights of residence and time to remove they had under any treaty. In 1798, the French treaty of 1778, was declared void, and the British treaty of 1794, except the ten first articles, had expired July 1812.

ART. 6. *Effect of naturalization as to municipal rights and former allegiance.*

§ 1. There is no doubt but that a general naturalization confers on the naturalized alien all the rights of a citizen in his adopted country, but these rights may be restricted by its laws or constitution, expressly or impliedly. He cannot by the Federal Constitution be president of the United States, unless a citizen when the constitution was adopted, nor a member of Parliament. Nor can he in either country have benefit of the 11 & 12 W. III. above cited, nor in some other cases where rights are confined to natural born citizens or subjects. As naturalization is the free gift of the country bestowing it, there can be no question if we consult the laws or laws of all nations, but that it may be modified as it pleases, and then the alien is at perfect liberty to accept or not, as he pleases.

§ 2. The great question now agitated is, whether a man emigrating from one nation to another with a view permanently to settle in the latter, or whether if naturalized in the latter, he is absolved of his allegiance and duties to the former; or whether an English subject coming to the United States, *animo manendi*, or whether if naturalized here, he is absolved from this British allegiance, and so in other cases. On this

A. D. 1813,
&c.

important question all respectable writers agree, and all good laws hold allegiance and protection are reciprocal ; that is, every one who owes allegiance and obedience to a government has a right to be protected by it in his person, his property, and his franchises according to its laws. CH. 131
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§ 3. According to the usages and understanding of all nations a man may have all the rights of a naturalized citizen or subject in his adopted country, and yet retain all his relations, civil and political, in his native country. For instance, the Marquis La Fayette was naturalized in the United States, but retained every such relation to France. So Mr. Jefferson was naturalized in France and there made a French citizen, and had he gone there would have been entitled to all the rights there of an adopted citizen, but he certainly retained all his relations to the United States, his rights and duties as a native citizen, and was in fact after such naturalization, elected President of the United States. So Mr. Church emigrated from England to the United States, here married General Schuyler's daughter and had children here, and was a contractor here, remained here many years, and yet retained all his civil and political relations to Great Britain ; for when he returned to that country he there purchased real estate and was a member of parliament in virtue of his native rights as a subject. He again came to this country, and is now a freeholder in New York ; and if not naturalized, he is certainly an emigrant *animo manendi*. It will naturally be asked what is his situation in this war now existing between the United States and Great Britain. Can he bear arms against the British government, and if taken in arms against that government, can it lawfully punish him as a traitor, and if it do so, what is the duty of the United States ? Is it to retaliate or make war on account of this punishment, or to leave Mr. Church to settle this affair himself with his native government ? Suppose Mr. Jefferson should go to France, where of course he would be a naturalized citizen or subject, and a war should take place between France and the United States, and he should be taken in arms fighting against them, and the United States should proceed to punish him as a traitor, and France should claim him and forbid the punishment, and say allegiance and protection are reciprocal, and he owes allegiance to France and is entitled to her protection : should we not say we admit the principle ? But Mr. Jefferson has to every intent his protection in the United States ; as he not only holds, but by their laws can here inherit real estate, claim his writ of *habeas corpus*, his jury trial, and a right to elect and to be elected to any office, even to that of President of the United States ; and therefore it is we claim his allegiance,

A. D. 1818.

CH. 131. and as it is his native and original allegiance, and the United States have never agreed to dissolve it, this allegiance takes place in case of collision of all other allegiance. And suppose further, the United States should cite the French code on the subject, of ancient times, revised in the year 1812, which enacts, that "no Frenchman can be naturalized abroad without our consent;" and "every Frenchman naturalized abroad even with our permission can at no time carry arms against France, under pain of being indicted in our courts, and condemned to the punishments inflicted in the penal code," which is death and confiscation of goods. And this law is executed regularly by the judicial courts of France.

August 23,
1812.

§ 4. Three things, however, seem to be clear and certain :
1. When a man emigrates from Great Britain to the United States, for instance, *to even domicil himself here*, or is even naturalized here, he does not lose his rights as a native subject in Great Britain, but it is clear from scores of cases, and invariable practice, that he retains his right and capacity to hold and inherit real estate there, his right to the writ of *habeas corpus*, to a jury trial, and to be judged by the laws of that land, like any native subject or citizen; and, what is still more, his right and capacity to inherit lands there, for among the thousands of cases of the subjects of Great Britain, for instance, emigrating thence to other countries, there permanently to settle or are there naturalized, and his ancestor has died seized of lands in his native country intestate, there is not a case recollected, and it is believed to be found, in which his other heirs have ever pleaded that the one so emigrating ought to be excluded his share in such lands, but on the contrary, he has invariably had his share allowed him : and 2. On such grounds it is that his native allegiance, when wanted, has been invariably claimed. And upon these principles were settled Collet's case, who was a natural born British subject, and settled and domiciled, with his family in Pennsylvania, in July, 1784, and the Court of Kings Bench said "Collet is a citizen of this country by birth, so that he cannot throw off his allegiance to this country. He is also a citizen of *America* for the purposes of commerce, it being found by the special verdict that he has been adopted a citizen of that country." And, therefore, he might trade and get insurance made even in England as an *American* citizen, though he remained subject to his native and British allegiance. A like principle has been lately recognised by all the judges of England in another case; these and other cases go to establish, clearly, the English law is, that a British subject may be naturalized abroad to any and all purposes but those of shaking off his allegiance, while he retains that to his native government. 3. The ques-

8 D. & E. 31,
Wilson v.
Marryat, A.
D. 1798.—1
East, 475.—6
D & E. 52,
246.—7 D. &
E. 517.—1
Bos. & P. 138.
—1 Bl. Com.
by Tucker,
part 2, appen-
dix, 90.—1
Bos. & P. 430,
Marryat v.
Wilson, in er-
ror.—Scott v.
Sohart.—
Fos. C. L.
Townly's
case.

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tion whether a natural born subject or citizen can, of himself alone, throw off his allegiance, bring a question depending, entirely on the municipal laws of his native country; certain it is the judges of that country only are competent to decide the question; they alone are the proper judges of those laws. And, Vattel, lib. 1, ch. 19, sect. 20, 21, 22. To show that Collet could not throw off his British allegiance were cited Co. Lit. 129, *nemo patriam in qua natus est exuere nec legiantiae debitum ejurare possit*;" also, Fost. C. L. 184.

Fost. C. L. 7
Mac Donald's
case,
59, 60.—1
Hale's P. C.
68.

§ 5. Also this case, in which it was held, "that it is not in the power of a foreign prince, by *naturalizing* or employing a subject of Great Britain, to dissolve the bonds of allegiance between that subject and the crown;" "though by such foreign naturalization he may entangle himself in difficulty, and in a conflict of duties." Indeed the cases in England are all one way on this point. Indeed the great advocates for the doctrine of *expatriation*, or emigration, permanently to settle abroad, do admit, "the British statesmen," "the British judges, the British lawyers, *all say*, that the right of *expatriation* does not exist" in Great Britain.

§ 6. Whether the United States have adopted this *British* doctrine or not, is nothing to the purpose, as it respects *British* subjects' *British* allegiance. For the United States may expressly admit their citizens to *expatriate themselves* by their constitution or statute law; and so may France or Russia: but this is no proof that British or Prussian subjects have this power.

§ 7. The inquiry, therefore, whether we have adopted this *doctrine of expatriation*, is material only as it respects our own citizens. Certain it is, that when we were British colonies, the doctrine, that a subject could not *expatriate* himself, extended throughout the British dominions, including these colonies, and so it was a part of their common law, and remains such, unless it has been altered by some constitution or law;—clearly not by any express statute or constitution of the United States, or of the individual States. And when the constitution of Pennsylvania provided, "that *emigration* from the State shall not be prohibited," it implied it might otherwise be prohibited, and it is by no means clear what that State meant by *emigration*, whether to other States or to foreign countries, or both, or *expatriation*, or not, or for what purpose, or with what intent. And if any one or two or three States, expressly admit *expatriation*, this cannot affect the general system. Then it remains to inquire, if there be any judicial decisions in the United States that admit of such *expatriations* as do *dissolve allegiance to them*; there have been but few on the subject—these are as follows.

CH. 131. § 8. This case, is on the whole against the doctrine of *expatriation*, and was in the Supreme Court of the United States, and it was said by Judge Iredell, if a law of the United States restricted expatriation, clearly, an act of a foreign state could not repeal it.

Art. 7.
3 Dal. 133,
170, Talbot
v. Jansen, cit-
ed, 2 Cranch,
307.—Isaac
Williams'
case, 2
Cranch, 82.—
1 Munford's
R. Appen. 1.—
2 Cranch, 280
to 336.

§ 9. This case was decided at Hartford, by Ellsworth, Chief Justice of the United States. Williams was an American citizen, went to one of the French West-India islands, and was naturalized; was taken acting under a French commission, against the English, in a hostile manner, when peace existed between the United States and Great Britain; and the question was, if he could expatriate himself and thereby cease to be a citizen of the United States, and it was decided he could not, and he was found guilty.—Reasons, 2 Cranch, 82

4 Cranch,
209, M'Il-
vaine v Coxe,
& 321.—3
Cranch, 97,
139.

§ 10. Coxe sued for an estate in New Jersey. He was born there and of age before 1775, emigrated in 1777, and joined the British army; bore arms against that State, and claimed to be a British subject; received compensation as a royalist, and remained abroad. New Jersey had forbidden her citizens to emigrate, and the court of the United States decided, that as by those laws he was forbidden to *throw off his allegiance*, no acts he could do could make him an alien. New Jersey act of October 4, 1776, declared all citizens then abiding there; and Coxe was then abiding there.

9 Mass. R.
454, Ainalle v.
Martin.

§ 11. In this case the court decided, that the duties of persons "arising from their allegiance to the country of their birth, remain unchanged and unimpaired by their foreign naturalization. For by the common law, no man can expatriate himself. Protection and allegiance are reciprocal."

2 Dallas, 42
Sloop Ches-
ter v. Brig Ex-
periment, 2
Dallas, 10.

§ 12. It is not material to whom a trader's national allegiance is due, if he is settled under another sovereign, and enjoys the privileges and is subject to the inconveniences of the place where he resides. Nor can a subject divest himself of the obligation of a citizen, and wantonly make a compact with the enemy of his country, stipulating a *neutrality* of conduct, but may capitulate if his government is no longer able to protect him. 2 Cranch, 305, Apthorp v. Backus, and Ch. 223, a. 5, s. 9.

ART. 7. *Pleas of alienage.*

§ 1. If an alien sue, to recover an estate, and but for his alienage has title, he is only to be barred, by, 1st, a plea he is an alien enemy, 2d, that he is an alien born without the allegiance of the Commonwealth &c. 3d, a plea specially pleading some special law.

8 D. & E. 166,
167, Casseres
v. Bell.

§ 2. In this first case, in the plea of *alienage*, the defendant must state the plaintiff was born in a foreign country, at enmity with this country, and that he came here without letters of *safe conduct* from the king. And the court said, as this "is

odious plea," the defendant must state every thing that can CH. 131.
 ist the plaintiff of his right of suing and recognized; Darrier Art. 7.

Arnaud, 4 Mod. 405, as a good form, and 2 Stra. 1082,
 'penheimer v. Levy, and Lord Raym. 282, Wells v. Wil-
 ams; Rast. Ent. 605. This was a personal action. *Quare*,
 as the plea in bar or abatement.

§ 3. This was a writ of entry *sur disseizin*, in which the 9 Mass. R.
 laintiff counted on the seizin of Anne Martin, his grandmother, 454, Ainslie
 within 50 years; disseizin by Richard Cranch & al. Plea, v. Martin.
 that the demandant was an alien, born within the allegiance of
 he king of Great Britain of parents subjects of said king, at
 Boston, in January, 1774, and that he withdrew before July,
 1776, from the Province of Massachusetts Bay into Canada,
 where he has ever since resided. The replication admitted
 the facts stated in the plea, and stated Jay's treaty of 1794.
 The point decided by the court was, "that the plea of *alien*
friend must allege that the supposed alien was born without
 the allegiance of the Commonwealth, except in cases of *ex-*
patriation by force of the conspirator and absentee acts, which
 must be specially pleaded."

It seems to be a general rule, that *alien enemy*, in a *personal*
 action, should be pleaded in abatement, for it is matter in bar
 during the war, and is only for delay, and not final. 10
 Johns. R. 69—*alien enemy* allowed to reside in the Unit-
 ed States in war, coming here either before or in it. It
 is implied, he has a *license*, if not sent away by the executive,
 and if he sue, it is not enough to plead *alien enemy*, but the
 defendant must plead and prove he is adhering to the enemy
 Clarke v. Morey. So implied if living in his own country. An
 alien enemy's right of action is only suspended during the
 war. 10 Johns. R. 183.

§ 4. March, 1798, Palmer & wife, in her right, brought
 ejectment against Hannah Downer for one eighteenth of about
 twenty poles of land, in Newburyport.—1st plea, pleaded by Mass. S. J
 T. Parsons, *nul disseizin*—2d plea, special alienage, and Court, Nov.
 stated that John Downer, deceased, April 7, 1778, was seized in 1801, Essex,
 his demesne as of fee, of the premises &c. and there died so Palmer & ux.
 seized the same day, leaving Moses, Mary, Susannah, and said v. Downer.
 Hannah Downer, his children and issue, being then citizens
 and subjects of, and owing allegiance to the Commonwealth of
 Massachusetts; and leaving also another son, Jeremiah Dow-
 ner, then living; that when said John died, Jeremiah was a
 subject of, and owing allegiance to the king of Great Britain,
 and not a citizen or subject of, or owing allegiance to the said
 Commonwealth, to wit at said Newburyport; and that said Jer-
 emiah ever after the death of the said John, and during the said
 Jeremiah's life continued and remained a subject of said king;

CH. 131. that on said John's death, the whole descended and came to
 Art. 7. said Moses, Mary, Susannah, and Hannah, as his children and
 heirs, who, on said John's death, entered and became seized,
 &c. and have continued so seized ; *hoc paratus*.

It was stated in the declaration, said Palmer's wife was daughter and heir of said Jeremiah, and claimed his part

Issue on *nul disseizin* ; replication to the 2d plea *precludi non*, and stated, Palmer's wife was a *natural born subject* of the king of Great Britain, born at said Newburyport, Jan. 1, 1765, and there from her nativity to the 4th day of July, 1776, was a subject of and owing allegiance to said king ; and on that day became a subject and citizen of and owing allegiance to the said Commonwealth ; and that the said Jeremiah at said Newburyport when said John died, was a citizen or subject of and owing allegiance to said Commonwealth ; without this, that the said Jeremiah was, when the said John died, a subject of and owing allegiance to the said king ; *hoc paratus*. The rejoinder was to be, *not a citizen of and owing allegiance* to said Commonwealth—but before it was made, a state of facts was agreed on, shewing said Jeremiah joined the enemy in Boston, in the summer of 1775, and continued with them there and at New York, assisting them to the end of the war ; and that then he removed to Nova Scotia, where he died in 1790. On which facts, including, also, the material facts in the declaration, and 2d plea, and replication, it was held he became an alien.

§ 5. There was some question as to the *hoc paratus* in the replication, and on what point the issue should be joined. But it was not material he was a subject of the king, for he might not be his subject, and yet be an alien, and incapable of inheriting his father's estate ; but the material question was, if he were a citizen or not of the Commonwealth ; if he was, he took a share of the estate.

7 Co. 67, case of Calvin.

§ 6. In this case of Calvin it was held, that the issue should be, whether born under the king's allegiance.

Rast. Ent. 606.—3 Salk. 29, Rogers v. Arthur.

§ 7. The same issue, whether an Englishman born. In one case there was the same issue, if Englishman born, and another, that he owed allegiance to the French king. It was alleged, the plt's. wife was a natural born subject &c., that the 11 & 12 W. III. c. 6, as to inheriting through, from, or under alien ancestors might be applied,—adjudged in this case to be adopted here.

1 Burr. 317, 323, Robinson v. Rayley.—Douglass. 60.

§ 8. The replication left the pleadings open, because the replication advanced new matter, and in order to get at the right issue, and on a particular fact not denying the whole plea. The plts. filed a second count demanding her part of her uncle Moses' estate, who had a double share. See this

se in part, 2 Mass. R. 179, 180, the reasons for deciding
 11 & 12 W. III. adopted here; and that when the father
 died, his son Jeremiah being an alien, the descent of the father's
 estate was just the same it would have been if Jeremiah
 had then been naturally dead. These cases are cited here to
 shew who are aliens by our laws in special cases, also Palmer's
 case to shew the alienage of the said Jeremiah, did in fact
 exist in the opinion of the court, April 7, 1778, when the
 father died, as well as to shew the forms of pleading alienage
 in these special cases. Jeremiah's part was one sixth, and he
 left three children, all citizens, giving each an undivided one
 eighteenth of the said twenty poles of land and buildings
 hereon. As Moses died in 1795 without issue, after his alien
 mother was dead a quarter of Moses' one third descended
 directly to the three children of Jeremiah, though he died an
 alien, also by reason of that statute. Pls. recovered $\frac{2}{3}$ or
 $\frac{1}{2}$ of the whole, both shares united.

§ 9. In this case also, the doctrine was admitted by counsel,
 and recognized by the court, that a subject cannot change
 his allegiance. And 1 Bl. Com. 369; 7 Co. 18, Calvin's
 case; 8 D. & E. Wilson v. Marryat, and Isaac Williams'
 case, all before named, were cited.

§ 10. It may be observed, that not only our court in this
 case of Palmer and wife v. Downer, but the Court of King's
 Bench in England in Wilson v. Marryat, and the counsel in
 both, and the judges of the United States' courts in other
 cases invariably considered the 4th of July 1776, the day of
 separation of the two countries, Great Britain and the United
 States, and all the inhabitants of both on that day as becoming
 the subjects of the former and citizens of the latter, and
 paying no regard whatever to the treaty of peace of 1783.

§ 11. *Assumpsit* for rent of a house in Boston. Held, an alien
 may take lands by devise in this State; also held, the
 said ninth article of the British treaty of 1794 was not annulled
 by the war of 1812: 3. The provisions of that article apply
 to vested remainders as well as to estates in possession; and
 held generally an alien may take by devise.

12 Mass. R.
 143, Fox v.
 Southack &
 al.—12 Mass.
 R. 8.

§ 12. A citizen conveyed lands to B, another citizen, in
 trust for an alien; he before office found was naturalized, and
 then the trustee released to him the estate he held. Held, his
 conveyance to the alien was made valid; also held, no title
 vests in the State until office found: 3. Naturalization has a
 retroactive effect and confirms the former title to the alien.

1 Johns. Cas.
 399, Jackson
 v. Beach.

§ 13. Aliens are not good and lawful men, so cannot be
 jurors, though freeholders and inhabitants.

6 Johns. R.
 332, Borst v.
 Beecker

§ 14. In the year 1778, a native Irishman came to the
 United States. In 1784, he purchased lands in New York

4 Johns. R.
 75, 80, Fol-
 liard & al. v.
 Wright.

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 Art. 7.

CH. 132. State, and died in 1798, without issue, but left a brother and three sisters in Ireland ; in 1804 an act was passed vesting the real estate of this native of Ireland in L, one of his sisters, married to an alien. Held, as the father emigrated to the United States after independence, he was an alien, and that the lands he held were by the ninth article of the British treaty vested in him and his heirs, though *aliens*, and that said act giving all to one sister was void, being contrary to the said treaty.

2 Johns. Cas.
407. *Fish v.*
Stoughton.
—4 *Cranch,*
321, *Daw-*
son's case.

§ 15. In 1784, a British subject was naturalized in New York, and in 1795 took the oath of allegiance to the king of Spain, and was appointed by him Spanish consul, and ever retained his domicile in New York. Held, he remained an American citizen. A, born in England before 1775, and ever living there, could not inherit in Maryland in 1793.

2 Johns. Cas.
29, *Kelley v.*
Harrison.

§ 16. An Irishman emigrated to New York in 1760, and died possessed of lands in 1798 there ; but his wife continued in Ireland and was an alien. Held, she was entitled to dower in the lands of which he was seized before our revolution, or July 4, 1776, but not in such as he acquired after that time. This case proves : 1. The general principle, the revolution did not divest any right she had previously vested in her : 2. That the ninth article of said treaty of 1794, does not give dower in lands here of which the husband dies seized to his alien widow.

3 Johns. Ca.
109, *Jackson*
v. Lunn.

§ 17. Our law recognizes an alien's purchase of land as good till office found. But in cases of descent the law does not notice an alien heir. Where, however in New York, title to land was acquired by a British subject before our revolution, his right to transmit the same by descent to an heir in *esse* at the time of the revolution continued.

CHAPTER CXXXII.

ENTRY AND POSSESSION.

ART. 1. General principles.

§ 1. Entry into lands and buildings and the possession of them are inseparably connected, for whoever enters into them so as to affect the estate or interest in them, must take and

have possession of them ; and his entry is to no purpose either to acquire title in time or to *oust* another, or to prevent the running of the statute of limitations, if there be not actual possession taken by him claiming a right to an estate in them. This entry is one of the remedies the law allows by the act of the parties, and has been already partly considered in the second chapter, where the true general principle is stated, and is, "if one unlawfully or without right take possession of my lands, I may peaceably enter upon them and regain possession ; and I may do this wherever his possession had a tortious beginning, and has tortiously continued in him less than twenty years ; but if he continues his possession though wrongfully more than twenty years, or more than five years and dies, and his heir enters, my remedy by entry is gone." How entry may or may not be in cases of abatement, intrusion, or disseizin, discontinuance or deforcement, so as to one or different counties, one or different disseizors, see that chapter ; see also *Ouster* and *Disseizin*, and other parts in this work, in which entry and possession have come into view as connected with other things. Entry and *ouster* is a disseizin. 1 Cruise, 15.

§ 2. Entry into, taking, and keeping possession of lands or buildings, claiming title, not only serves the purpose of ousting wrongdoers, and of regaining possession where he who enters has right and title, and of making the law of limitation inoperative ; but also, such entry and possession continued certain periods of time alone constitute to him a good title against all the world. As where formerly one so entered and possessed lands sixty years peaceably, he thereby alone gained a complete title to them ; and so now in forty years in this State. And therefore, if A without any kind of title enter into B's lands and *oust* or disseize him and take possession, claiming title to them in fee simple, and continue this possession quietly forty years, he thereby gains as good a title to these lands and to all estate and interest in them as he could have by any deeds or records whatever. And as B in such case cannot prove any seizin by or for himself within forty years, he can no more recover the lands than he could if he actually and fairly conveyed them by deed. So in many cases and to many purposes such entry and possession twenty years is a good title, as in ejectment in England ; (see *Doe v. Prosser*), is necessary to complete an estate for years at common law. 4 Cruise, 115. At common law where a party had a right to enter, he might enter with force, but by 15 R. II. he is restrained from entering with force, though he has a right to enter. "An estate of freehold or inheritance cannot be defeated without an entry." A tortious entry never relates back. Our deed

CH. 132.

Art. 1.

1 Cruise, 247
—3 Salk. 169
—3 Co. 59,
Lincoln Col
lege case.

CH. 132. recorded never works a disseizin but by actual entry, and
 Art. 2. then it is the entry, and not the deed, that works the disseizin;
 so only is the disseizin removed.

ART. 2. *What is an entry &c.*

Co. Lit. 55,
 56, 246.—
 Entry neces-
 sary to create
 a seizin in
 deed.
 1 Cruise, 12.
 —1 Cro. 188,
 Cotton's case.
 —Co. Lit.
 252.—
 1 Cruise, 13.

§ 1. Any act that would be a trespass were it not a legal entry is in judgment of law an entry, as cutting a tree &c. without consent; but if one come on land by my consent, he does not avoid my possession, and his coming on the land is to no purpose. An entry on part of the land is an entry into a house on another part of it. And if a disseizor make divers several leases for years, and the disseizee enter into one part in the name of all, this is a good entry into all, for they are all derived out of one freehold; but the heir need not enter on a lessee for years.

Watkins' Law
 of Descent,
 44, 45, 46, 47,
 48.—1 Cruise,
 12.—1
 Cruise, 14,
 49, 124, 247,
 248.—A right
 of entry will
 support a
 freehold con-
 tingent re-
 mainder.
 2 Cruise, 326.
 —14 Mass. R.
 90.—Watkins,
 52, 53, 137.—
 Hob. 126.—
 2 Cruise, 517,
 539, 552.—
 Watkins, 54,
 55.—1 Cruise,
 15.—Lit. sect.
 326.

§ 2. To make a good entry the heir must actually enter into the lands, and such entry may be into any part of them, and by any part of the person, and that entry shall give him actual seizin of all the lands whereof his ancestor died seized in the same county, and into which he had a right to enter and were in possession of the same abator. But this entry must be peaceable, and not with a strong hand; and a claim made as near the land as it can be safely is an actual entry. But the entry on the land must be with an intent to enter and vest the title, and this also must be made known to the witnesses; therefore, if I go upon the land to dine with my disseizor or to see his horses, it is no entry. So this entry may be by the guardian, or possession of the ancestor's lessee for years, or tenant at will. So the entry of one joint-tenant, tenant in common, or parcener, is the entry of the others, and makes *possessio fratris* in the others who did not enter. So the entry and possession of one is the entry and possession of the others to several purposes; but the entry and possession of one will not vest the estate and possession in another when to his disadvantage, his assent then not being presumed. So the entry and possession of the younger brother or of the sister, is the entry and possession of the elder brother, the heir, or other sisters; but not if the younger brother &c. avowedly disseize. Therefore, if the younger brother avowedly disseize the elder, and dies seized, the entry then tolls the entry of the elder. So if an indifferent person enter to the use of the heir, and this by mere parol authority, it is the heir's entry, as where a husband asks A to enter on his wife's land, or if no authority at all, if the husband afterwards assents, it is good, or even does not afterwards assent. So an entry by attorney is a good entry. "So if generally a person enters in the name of him who has right, even though it be without a fraudulent command or subsequent assent, and whether

Co. Lit. 243.

Watkins, 56.

he who has right be an infant or of full age, it shall vest the freehold in him who has such right. So the possession of the husband is the possession of the wife. If the heir exercise any act of dominion over the inheritance, as repair houses, fences, receive rents, &c, it will amount to an actual entry. If the hereditaments be incorporeal, the heir must receive the rents &c. in order to give him actual seizin, and make him the stock of descent; for though seizin in law of an incorporeal hereditament will in some cases make the husband tenant by the curtesy, as of rent before it become payable, yet it will not be sufficient to turn the descent, but an actual seizin must be acquired. A right to enter is not assignable. 2 Cruise, 6.

CH. 132.
Art. 3.

§ 3. By this statute one may enter on the alienee of the tenant in dower in certain cases. 11 H. VII. 20.

§ 4. The heir before entry has *seizin in law*, for while the actual possession is vacant, the law presumes he has possession who has right. But when one enters and abates, he *fills the possession*, and rebuts and turns to a mere right the seizin in law; for when another is actually seized and possessed, there is no room to suppose the heir seized. The heir may release his right to the abator, and may have a writ of right before entry, as this goes on the mere right of property.

Before entry a joint tenant dies, this does not affect survivorship, 2 Cruise, 501. —Watkins, 25, 31, 40.

There can be no mesne seizin of a remainder or reversion expectant on an estate for life, so as to make a *possessio fratris* in England, as there can be no actual entry thereon. Watkins, 137. Without entry a devise transfers the freehold. 6 Cruise, 9.

2 Cruise's Digest, title Reversion, a. 20, 24.

ART. 3. *When the entry is taken away.*

§ 1. May be by the alienation of tenant in tail from his issue. 1 Cruise, 45. This act provides; that "no person, unless by judgment of law, shall at any time hereafter, make any entry into any lands, tenements, or hereditaments, but within twenty years next after his right or title first descended or accrued to the same; and in default thereof, such person so not entering, and his heirs shall be utterly excluded and disabled from making such entry thereunto," with an exception as to minors, *femes covert*, persons *non compos*, imprisoned, or beyond sea, or without the limits of the United States, when the right accrues, who have ten years added to said twenty years. Hence if one having a right of entry according to this act, do not enter in season, his right of entry is taken away and gone.

Mass. Act, July 4, 1786.

§ 2. This statute recites that divers persons had by strength and without title entered into lands, tenements, and other hereditaments, and wrongfully disseized the rightful owners and possessors thereof, and so being seized by disseizin, had thereof died seized, by reason of which dying seized the disseizee, or such

32 H. VI., 33.

CH. 132.

Art. 3.

See Ch. 104, a. 3, s. 39. In order there may be a descent cast on the heir, the ancestor must actually disseize. Hence if A own vacant lands, as wild lands, and B enter on them, though wrongfully, possess five years, and die, there is no descent cast. 6 Johns. R. 197, 219, Smith v. Bur- tis. Co. Lit. 157, 238.—Plow. 47.—2 Bac. Abr. 45. Co. Lit. 287, 289.

other persons as might before such descent have lawfully entered into said lands and tenements, were and be thereby clearly excluded of their entry into said lands and tenements, and put to their action for their remedy and recovery therein, to their great costs and charges; for remedy whereof it is enacted, "that the dying seized hereafter of any disseizor of or in any manors, lands, tenements, or other hereditaments, having no right or title therein, shall not be taken or deemed from henceforth any such descent in the law for to toll or take away the entry of any such person or persons or their heirs which at any time of the same descent, had good and lawful title of entry into said manors, lands, tenements, or hereditaments, except that such disseizor hath had the peaceable possession of such manors, lands, tenements, or hereditaments, whereof he shall so die seized by the space of five years next after the disseizin therein by him committed, without entry or continual claim by or of such person or persons as have lawful title thereunto."

§ 3. Before this act, if A disseized B and died seized, immediately B's right of entry was gone. And it is said that this statute does not extend to abators or intruders, or to the disseizor's feoffee, but successors may have benefit of it.

If the disseizor has been in five years, by the act, it does not avail, if the owner in this time *has entered*, or made *continual claim*. The statute speaks only of him who had right of entry at the time of the descent, and after five years the disseizee must make continual claim, as before the statute. To take away the entry, the disseizor must die seized; if, therefore, he makes a lease *for life*, and die seized of the reversion, this does not take away the entry of the disseizee. Otherwise, if he only makes a lease *for years*, or suffers execution of judgment for debt. But a dying seized in law is sufficient. As if B, an infant, be disseized by A, and A die seized, then the infant comes of age and has title to enter, then A's heir dies before entry, and so is only seized in law, yet this seizin in law takes away B's entry.

Co. Lit. 240. § 4. So when one claims entry by force of condition broken, devise, &c. descent cast will not take it away; for if it should, he would be without remedy, as he has no action.

Co. Lit. 240. § 5. "If the disseizor die seized, and his heir enter and en- dow his wife of the third part, the disseizee may enter on that, for she is in by her husband, and the law judges no mesne seizin between husband and wife." To toll an entry, the land must descend immediately on the death of him who died seized. No curtesy or *privement ensient* &c. can inter- vene. Nor can one have any benefit of the descent who is *particeps criminis*.

Co. Lit. 242. § 6. "If one die seized in fee or tail, and leave two sons,

the younger, whether of the whole or half-blood, abate, CH. 132.
 have issue and die, yet may the elder, or his heir, enter, Art. 4.
 it shall be intended the younger did not set up a new title,
 that he claimed as heir to his father in his elder brother's
 sence, and that it was his intent to preserve the possession
 against strangers." So "if one parcener enter generally, and Co. Lit. 243,
 the profits, this shall be accounted the entry of them 378.
 th; but if she enter specially, claiming the whole land, and
 the whole profits, she is an abator, and yet if she die
 zed, the other may enter; but if she make a feoffment of
 , and take back an estate in fee and die seized, the other
 not enter, for the feoffment destroys the privity."

§ 7. But if the younger brother *avowedly* disseizes the Co. Lit. 243.
 der, and dies seized, a descent cast tolls the entry of the
 der. So if the feoffee of the younger die seized, the descent
 takes away the elder brother's entry. So if a stranger abate,
 and the younger disseize him and die seized. For in none of
 these cases can it be intended he entered to preserve his elder
 brother's title, nor can this be intended if the younger directly
 disseize the elder brother, nor intended if the younger can
 ever have the elder's title.

§ 8. If A disseize B in time of war, which is called occu- Co. Lit. 249.
 ation, and die seized also in a time of war, the disseizee may
 enter; and it is said to be time of peace when the courts are
 open. And if lessee for years be *ousted*, and he in reversion
 disseized, and the disseizor die seized, yet may the lessee
 enter, for by his entry he defeats not the freehold that de-
 scended.

§ 9. If one be at large when disseized, a descent during Co. Lit. 259.
 his imprisonment binds him. The same as to one at home,
 and then out of the country.

§ 10. In cases of *gavelkind* land the entry of one is the Watkins, 53.
 entry of all; hence when one enters the entry of the others is
 not taken away.

§ 11. The reasons why descent takes away entry: 1. Be- 3 Bl. Com.
 cause the heir comes to the estate by act of law, and not by 176, 177.
 his own act: 2. Because the heir may not, suddenly, know
 the true state of his title: 3. It is agreeable to the spirit of
 the feudal tenures: 4. It is agreeable to the dictates of rea-
 son, and the general principles of law. If A disseize me I
 may enter on him; but as to his heir I must sue him, he hav-
 ing the apparent right of possession; the land passes to him
 in legal form.

ART. 4. *Continual claim.*

§ 1. If one dare not enter into land for just fear of death, 2 Bl. Com.
 mayhem, imprisonment, or battery, his continual claim, made 318.—Noy,
 yearly in due form of law, as near the land as possible, with 20 max.—Co.
 Lit. 48, 260,
 252.

CH. 132. suffice without entry, and is an entry in law; and if the
 Art. 5. father claim before descent cast and die, his son may enter.

But the claim of another will not avail me, if I may claim myself, and do not. And if there be two joint tenants, and one claim and die, the other may enter. A livery within view is good, and yet a claim within view, where a man may enter without fear, is not good. Such claim is equivalent to an actual entry. And a "claim within view reduces a freehold *in law*, to an *actual* freehold, though the claimant be not afraid to enter." However late the claim is, a descent cast within a year and a day after, takes not away the entry. At law this claim was good for a year and a day, and should be repeated yearly. Now since the 32 H. VIII. c. 33, one in five years as to disseizors is good.

Co. Lit. 254. § 2. "If tenant in tail, on whom such claim is made, be seized in tail, immediately after such claim he becomes seized in fee; for his occupation after is a disseizin;"—and trespass lies. And if the tenant occupy with force and arms, or with a multitude of people, when the owner claimed, he may have a writ of forcible entry, and recover treble damages. The master may order his servant how and where to make continual claim. A suit or præcipe seems to amount to a continual claim.


Co. Lit. 257, 258. § 3. If there be tenant for life, (and remainder-man in fee) be disseized, claim ought to be made by him in remainder. Lit. s. 433. If he has right of entry, though he has no title to the profits immediately, or he makes continual claim, as if lessee for years be *ousted*, and the reversioner disseized; he in reversion may make continual claim, though he is not entitled to the present profits. So continual claim by tenant for life is sufficient for him in reversion or remainder.

Co. Lit. 263. § 4. It was sufficient if the claim was once made within the year and day before the dying seized, though the disseizor had possession for twenty or forty years after the disseizin. But this cannot mean after the right of entry is gone, for then the claim or entry is to no purpose.

3 Com. D. 55. § 5. With regard to entry or claim, each disseizor makes a distinct entry, which, by several disseizors, being distinct acts of notoriety, do require distinct solemnities to defeat. So "each having an independent possession, an entry upon one of them can never affect the rest, so as to destroy their separate possessions." And if A disseize me of three acres and devise them to B, C, and D for life, I must enter on each, as each disseizor makes a distinct entry. But otherwise, if for years.

ART. 5. *Who may enter, and how.*

Doct. & Stud. § 1. Entry for condition broken. A leases to B for years, paying 20s. rent to him and his heirs, and if the rent be be-

hind 40 days, then A or his heirs may enter : rent is behind, **CH. 132.**
 A demands and dies, his heir may enter. But if A had died **Art. 5.**
 without demanding the rent, and the heir demands it, he cannot enter. The lessor cannot enter but for certain purposes. 
 1 Cruise, 64.

§ 2. "If one be disseized by two several disseizors there must be several entries." Each disseizin must be defeated by a distinct entry. **Co. Lit. 263.**

Governor Barnard in his letter to Lord Hillsborough stated it to be law in the Province of Massachusetts, that the owner of a house occupied by tenant at sufferance, or by a wrongdoer, might enter by any means he could, and turn him out without an action. It must be added the owner cannot use force so as to break the peace.

§ 3. "He that will take advantage of a condition broken must enter if he can, if he cannot, he must claim ;" for a freehold in grant or livery cannot cease by a condition without entry or claim, "though the words are, *proviso*, that if he do not pay &c. that then the estate shall cease and be void ; whether the conveyance were by feoffinent, bargain and sale, or devise," &c. But if the fee pass by construction of law, and the condition be broken, it reverts by like construction without entry or claim. And so is the law as to uses. **Co. Lit. 218.**

§ 4. "If one have cause to enter into divers lands in the same county, an entry into part in the name of all to which he has a right of entry, regains the seizin of all in the same county, but a general entry into any one parcel regains no more than that one parcel. And if several actions be required, as if one be disseized by two several disseizors, or by one disseizor, and he lease to three severally for life, there must be several entries. But if he lease to many severally for years, one entry will be sufficient. So if I be disseized of several parcels of land by the same person at several times, or if several parcels of land be subject to one condition, one entry is sufficient for all ; but if the conditions be several there must be several entries." **Co. Lit. 263.**

§ 5. And if one be disseized of land in different counties there must be several entries. If one gets possession of my lands or tenements, who has no right, I may make a formal but peaceable entry thereon, declaring I thereby take possession ; and if I be deterred from entering by threats or bodily fear, I may make claim as near the land as I can, which is in force a year and a day only, and if this claim be repeated yearly it is every way equal to a legal entry. Such an entry puts a man into the immediate possession of the estate who hath a right of entry thereon, and makes him complete owner, able to convey by descent or purchase. **3 Bl. Com. 175.**

CH. 132.

Art. 5.

3 Bl. Com.
176, 178.

§ 6. This remedy by entry takes place only in cases of abatement, intrusion, and disseizin, and in these because the original entry of the wrongdoer was unlawful. But in discontinuance or deforcement the original entry being lawful, and an apparent right of possession gained, the owner cannot enter, but is driven to his action. But in the cases of abatement, intrusion, and disseizin, this right of entry may be taken away, tolled, or lost by descent. "Descents that take away entries are when any one seized by any means whatever of the inheritance of a corporeal hereditament dies, whereby the same descends to his heir," and however feeble the title of the ancestor may be,—and this for the four reasons above stated; but the above statute of 32 H. VIII. c. 33, has made an exception to this general rule, as to disseizors who die seized, not having had five years' quiet seizin.

Lit. sect. 385,
386.—2 Bac.
Abr. 36.

§ 7. Not only if A disseize B and have quiet possession five years and dies seized is B's entry tolled, but also if A disseize B and make a gift in tail to C, and he die seized, and the estate is cast on his heir, B's entry is tolled. And the reason is further, because the freehold is cast on the heir in each case by act of law, and the law makes him feudal tenant to do the feudal duties, and to fill the possession and to answer the actions of all persons; and as the law gives him the right and subjects him to these duties previous to any act of his own, it must protect his possession till evicted by judgment of law. Again, there is negligence in the disseizee in not having entered or claimed in the disseizor's life time. And in feudal times the heir on the descent paid the relief in the nature of a new purchase. But in order that the heir be thus protected it is an invariable rule that he have in possession by descent from his ancestor his estate of inheritance, and be not in the land otherwise, as by *remitter* or other title than by such descent. If the disseizor make a gift in tail, and the donee dies seized leaving issue, the disseizee's entry is tolled, because the same estate descends from the donee to his heir; but when the estate tail is spent, the disseizee may enter on him in reversion or remainder, for there is remaining no descent in the way, and no relief paid by him in reversion or remainder; nor is possession cast on him till entry voluntarily made, but on the heir by descent and operation of law.

Co. Lit. 238.

Co. Lit. 238.

§ 8. The disseizee may enter on him who gains seizin by stratagem. As if a grandson disseize A and enfeoff his grandfather, who dies, and the land descends on his son, though A cannot enter on him on whom his father's inheritance descends, yet when it descends to the grandson, the disseizor, A may enter on him, for his feoffment to his grandfather was a stratagem to get the lands by descent; this the law will not

favour, that there be no entry on the heir he must be innocent CH. 132.
and in the land purely by legal descent. Art. 5.

§ 9. 'That a descent may bar an entry the ancestor must die seized of a freehold and fee, or of a freehold and fee tail ; for if he has not the freehold, another is feudal tenant, and the freehold is not cast on the heir of the disseizor at his death, for the law then cannot suppose the right of possession then in the heir when it is in another. This is the case if the disseizor make a lease for life in force at his death, for then but a right of reversion descends to his heir, and though this is a right against all other persons, it is not against the disseizee. To bar his entry the heir must have a right of possession, and this he had not, but when he was feudal tenant immediately on the death of his ancestor ; and this right of possession the law allowed, because he was made feudal tenant by it. 2 Bac. Abr. 37.

§ 10. But if the disseizor make a lease for years, or has his land extended on judgment or recognizance, and dies seized, the disseizee cannot enter, for the freehold or fee are cast on him by act of law. Co. Lit. 239.

§ 11. But if rent or other incorporeal inheritances descend, the disseizee's entry is not gone, because there is no disseizin but at his election ; but the disseizee cannot enter if the disseizor's estate do descend, freehold and fee, to either his collateral or lineal heir. But entry on *escheat* does not toll the disseizee's entry ; here is no descent, no relief paid. If the disseizor die seized and his heir without issue is still in by the descent to him, the disseizee's entry is gone ; and once gone, he cannot enter on the land by *escheat*. And one is not barred of his entry when it is his only remedy. As if land is devised to B in fee, by A seized in fee, who dies, and the freehold in law is cast on B, and before his entry the heir of A enters and dies seized, B may enter ; for not having had possession he would be without remedy if without entry. Dower when assigned so far defeats the descent. Co. Lit. 237. — 2 Bac. Abr. 36.

§ 12. If I enter on the lands of one, and my entry may be a disseizin or in preservation of his estate, it shall be deemed the latter, if by any means I can inherit his estate, for the law will intend I prefer his title to one by disseizin. But this cannot be presumed if I *oust* him, or do any act shewing I mean to disseize. Co. Lit. 240.

§ 13. So if the father die seized, and a stranger abates, and the younger son enters on him and dies seized, after a descent from him, the elder son cannot enter. As the *possessio terræ* was not *vacua* when the youngest son entered, so his entry was a disseizin. Co. Lit. 242.

§ 14. Whenever the descent that takes away the disseizee's entry is avoided, he may enter. As when the disseizor enfeoffs 2 Bac. Abr. 40, 41.—Lit. s. 409.

CH. 132. A on condition and he dies seized, his heir gains a right of possession and the disseizee cannot enter, but if the disseizor enter for condition broken, then is the descent defeated and the disseizee may enter, as the disseizor is in of his defeasible estate, having only a naked possession without any right of possession, and such a one may always be entered upon by him who has it. And so he may enter notwithstanding the civil death of the disseizor, though a descent is cast, for it is not a descent that comes by the act of God.

2 Bac. Abr.
46.

§ 15. If one lease for life, and the lessee is disseized, and the disseizor die seized within five years, the lessee for life may enter, but if he dies before he enters it is said the reversioner cannot enter, as his entry was not lawful on the disseizor at the time of the descent; but if lessee for life die first and then the disseizor had died seized, he in the reversion might have entered, as having title of entry at the time of the descent, so within the letter of 32 H. VIII. though he was not the immediate disseizee. Same law of a remainder.

Co. Lit. 246.
—7 H. VII. c.
24.—Reeve,
29.

§ 16. *Baron and feme* seized in her right are disseized by A, and he dies seized and the land descends to his heir, the baron's entry is gone, and if his wife survive him, hers is not taken away; but it had been, if she had been disseized before marriage and of age, though disseizor died after, as it was her folly to marry one who could not enter,—or as she did not enter before she married. But if a minor when she was disseized, and A and her husband die, she surviving may enter. And if A's wife was endowed it made no difference, as she would not be in by descent. A disseizes B, tenant for life, and A and his heirs continue in possession forty years and till B dies; at his death the reversioner's right of entry commences.

15 Mass. R.
471.

ART. 6. Forcible entry.

Mass. Act,
June 30,
1784.

§ 1. By this act it is enacted, that two justices of the peace, *quorum unus*, be authorized by jury to inquire, "as well against those who make unlawful and forcible entry into lands and tenements, and with strong hand detain the same, as against those who having a lawful and peaceable entry into lands and tenements unlawfully and by force hold the same," and when found &c. to make restitution thereof to the complainant. This act then directs the mode of proceeding—a warrant to the sheriff to cause to come before the justices twelve good and lawful men of the county, each having a freehold of 40s. a year, to be impannelled and sworn &c. to inquire into the forcible entry or forcible detainer complained of. The verdict of guilty finds the "lands or tenements were in the rightful and lawful possession of the said A. B. and that the said E. F. did, on the same day, unlawfully, with force and arms, and with a strong hand, enter forcibly on the same (or being

unlawfully on the same, did, unlawfully, with force and a strong hand) expel and drive out the said A. B. and that he doth still continue wrongfully to detain the possession from him, the said A. B.;" and that he ought to have restitution without delay. On this verdict a writ of restitution issues &c., and no appeal; but the proceedings may be removed by *certiorari* into the Supreme Judicial Court in the county, and then quashed for irregularity, if any; nor shall such judgment be a bar to any after action brought by either party.

CH. 132.
Art. 6.

It is further enacted, "that this act shall not extend unto any person who hath had the occupation, or been in the quiet possession, of any lands or tenements by the space of three whole years together next before, and whose estate therein is not ended or determined."

§ 2. By this act one justice, on complaint, was directed to go to the place and make inquiry with the sheriff and *posse comitatus*, if necessary; two justices, who were to inquire into the matter, were to summon eighteen on the jury, fourteen at least to be impannelled. And the justice or justices had power to fine the offender, not exceeding 40s., and bind him to the good behaviour, and to appear at the next court of sessions; and the party aggrieved to recover treble damages and costs.—*Quære* if these provisions be not yet in force.

Prov. Act,
A. D. 1700s

§ 3. In the Colony of Massachusetts there was passed early on this subject, a law that punished force used, principally in regard to lands recovered by judgment, and forcibly detained by the deft.

Colony law,
P. & C. Laws,
p. 54, 55.

§ 4. This offence may be indicted at common law. If A be seized, and B having a good right to enter accordingly, doth enter *manu forti*, he may be indicted, notwithstanding his right, and restitution may be made.

Ch. 204, a.
10.—3 Salk.
170.—2 Salk.
460, 479.

"One may justify a forcible entry if he were three years in quiet possession immediately before, and his estate continues."

Farr. R. 138,
Hardesty v.
Goodenough.

§ 5. In this case an indictment, at common law, charging the defts. with having *unlawfully and with a strong hand* entered the prosecutor's mill, and expelled him from the possession, was adjudged good. (Form of the indictment) four counts, two omitted the words, *with strong hand*. To all the counts there was a general demurrer. Lord Kenyon said, "It is perfectly clear that a *mere trespass*, which is the subject of a civil action, and where the words, *vi et armis*, are introduced as matter of form, cannot be converted into an indictable offence. But there is no doubt but that the offence of forcible entry is indictable at common law, though the statutes give other remedies to the party aggrieved, restitution and damages." And "no one shall, with force and violence, assert

8 D. & E.
357, The
King v. Wil-
son & eleven
others. See
Ch. 204 at
large.

CH. 132. his own title." Grose J., the words, "*with a strong hand*,"
Art. 6. mean something more than a common trespass. When one

has had three years' quiet possession, and a continued estate, the act does not apply ; but the case is at common law. This was the first act against forcible entries ; and provided that no persons, but the king's ministers, should ride armed by night or by day.

2 Ed. III. c. 3.

2 Bac. Abr. 555.—1 Sid. 156, 207.—1 Lev. 113. § 6. Bacon, Dalton, and others, have adopted Hawkins' idea. Hence some statutes were necessary to restrain the mischiefs the common law permitted, according to the opinions of many lawyers.

5 R. II. c. 7. § 7. This was the first statute that directly applied to this subject, and provided, "that none from thenceforth shall make any entry into any lands or tenements, but in cases where entry is given by law ; and in such cases not with *strong hand*, nor with *multitude of people*, but only *peaceable and easy manner*," on pain of fine and imprisonment. This act was express against all forcible entries, even where there were a right of entry. This act no doubt our ancestors adopted as a part of their common law, before our act was passed.

15 R. II. c. 2.
—8 H. VI. c. 9.—31 El. c. 11.—21 Jam. I. c. 15. § 8. These statutes were passed to enable justices of the peace to inquire into forcible entries and detainers, and to make restitution in certain cases. On the principles of these English acts our statutes before cited were formed, but not precisely on the same principles.

12 Mod. 495.
—St. A. 794.
—Sayer's R. 176.—Ld. Raym. 1305. § 9. In these statutes two principles are clearly established : 1. That even a right of entry is to be asserted but only in a "*peaceable and easy manner*." 2. Where facts exist as stated in the verdict above, there must be a restitution, but without affecting any right of action.

§ 10. What is an entry in a *peaceable and easy manner*, or not with a *strong hand*.

2 Bac. 558.—H. P. C. 138, 145, 146.—2 Inst. 257.—Lamb. 143. § 11. Forcible entry must be with a strong hand, with unusual weapons, or with menace of life or limb. And if a man enter peaceably into a house, but turns the party out of possession by force, or by threats frighten him out of possession, this is a forcible entry. But it is not, to threaten to destroy his goods if he will not quit possession.

2 Bac. Abr. 558.—1 H. P. C. 145.—2 Rol. R. 2.—Crom. 70.—Noy, 136.—20 H. VI. 11. § 12. If a house be bolted, it is forcible to break it open ; so far law writers agree. But it is said by many, and denied by some, that it is not forcible to draw a latch and enter into the house ; and if a man, whose entry is lawful, shall entice the other out of the house and enter, the door being open or only latched, his entry is justifiable. According to several cases it is not forcible to enter into a house through a window, or by opening a door with a key. See Ch. 204.

1 Hawk. P. C. 145. § 13. It is Hawkins' opinion, that if A find B out of the

house, and forcibly withhold him, and send persons to take peaceable possession of it in his absence, this is forcible entry; for though the force be not on the land, it is in relation to it, and must be within the meaning of the statute. CH. 132.
Art. 6.

§ 14. So if a man enter to distrain for rent in arrear, with force, this is a forcible entry; for he claims a right in the land, and this he is not to assert with force. But it is not forcible for one to ride over lands to market &c. to which he has right, if he express no intent to claim it. But if one be entitled to rent, and be resisted from his distress by force, this is a *forcible disseizin* of the rent, and the offender may be fined and imprisoned. But there is no writ of restitution, but of the lands and tenements themselves. 2 Bac. Abr.
558.

§ 15. If A, having a defeasible title in lands, continues with force in the possession thereof after a claim made by B, having a right of entry, A shall be adjudged to have entered forcibly; for he uses force to defend against right, when he has none. Hawk. P. C.
145, 147.

§ 16. If divers come in company where their entry is not lawful, and one uses force and the rest enter peaceably, this is a forcible entry in all, because in company to do an unlawful act, and the act of the one is the act of all. But otherwise if there be a right of entry, then only he is guilty of force who uses it, as those who assert their right without force are not wrongdoers. If divers enter by force to A's use, and afterwards he agrees to it, he is a disseizor, but not guilty of a forcible entry within the statute, which does not punish an agreement, but only the force and violence of an actual entry. If one have no right to enter, and enter peaceably, and holds possession by force, though his entry was peaceable, the justices may remove him if he had no right to enter. But if his entry be *peaceable* and *lawful*, it seems "if a man be got peaceably into his own, he may defend it by force." If two are in a house under different titles, he is in possession who has right, and if there be no appearance of force, the justices have nothing to do with the case, but either party must seek a remedy in an action. 9 Co. 67, 112,
115—Co.
Lit. 157.—2
M. VI. 11.—2
Bac. Abr.
559.—2 H.
VII. 16.

Cro. Jam.
151.—Sid. 97,
414.—H. P.
C. 149.—H.
P. C. 151.—
2 Bac. Abr.
559.

§ 17. A joint tenant or tenant in common may be guilty of a forcible entry by forcibly ejecting or excluding his companion, the legality of the entry no way excuses the force and injury done to the other. Hence an indictment for forcibly entering into a moiety of a manor &c. is good. And a feme covert or infant of eighteen years of age may be guilty within the statute. The indictment ought to shew some estate, leasehold or freehold, or at will, entered upon. On a general view of this subject of forcible entry and detainer, one would naturally think that many cases must have arisen, and have 2 Bac. Abr.
560.

CH. 132. been judicially settled ; but experience is quite otherwise.
 Art. 7. But very few cases on this subject are found published in the
 English books, and but one in our own in Massachusetts.

Co. Lit. 46.

If the lessee for years dies before entry, his executor or administrator may enter. So if the lessor dies before the lessee enters, he or his executor may enter. And if a lease be to several persons and one dies, his interest survives.

10 Mass. R.
 403, 410,
 Commonwealth v.
 Dudley.

§ 18. This was a writ of *certiorari* to two justices of the peace, in case of *forcible entry and detainer*. And these points were decided : 1. A is seized and possessed of land he bought of B, by deed duly executed, but not recorded. A contracted to sell it to C, and to this end cancels B's deed to A, and requested B to convey to C ; this B did. C's title is good, though A continued in the occupation with C jointly, after B's deed to C. 2. A mere refusal to deliver possession of land when demanded, is not a *forcible entry and detainer*. There must be some apparent violence, in deed or word, to the person of another, or some circumstances tending to excite terror in the owner, and to prevent his claiming his right.

ART. 7. Possession.

§ 1. In thousands of cases estates and property depend on possession, and to decide who has the property it is necessary to decide who has the possession. This question, who has the possession of real or personal estate, has already often occurred in other sections, particularly in those relating to bankruptcies, bailments, factors, insolvencies, liens, seizin, trover, &c. &c. The object is here to bring into view a few other cases, in order to find the principles on which this question is usually decided. The case of *Goodtitle v. Newman*, c. 104, a. 3, s. 4, is a strong case to shew how the law casts the actual possession, on the death of one, of his lands upon his daughters, and then on his after-born son, who lived but a few weeks. So *Denn v. Barnard*, Ch. 104, a. 4, is a strong case to shew that if no other title appear, a clear possession of twenty years is evidence of a fee. The possession of my lessee is my possession ; so is that of his wife, children, or servants ; but not as to his cattle—their being on the land makes no possession, —nor his goods.

3 Bl. Com.
 Chris. notes,
 14. Of a
 guardian in
 socage is that
 of his ward.
 So of a wid-
 ow that of
 her hus-
 band's heir,
 1 Cruise, 14,
 —her son, 3
 Cruise, 417.

§ 2. An uninterrupted possession for *sixty years*, will not create a title where the claimant had no right to enter in that time. As where an estate in tail for life or years continues above sixty years, still the reversioner may enter and recover the estate. And in all cases possession of land to run against the owner must be *adverse*, or had in opposition to his title, and avowedly so.

§ 3. Every livery of seizin of land to one gives him possession, and passes it to him. He freely accepts it, and he

who makes livery, freely parts with it. He quits possession, the other takes possession, and the law considers the land as passing from one to the other accordingly. Possession is the visible part. CH. 132.
Art. 7.

§ 4. It has been already stated, that if two are in possession of a tenement claiming by several titles, the law considers him in possession who has the right to have possession; and that the possession of the particular tenant is the possession of him in reversion or remainder. But one entitled to common or a commoner, has no possession and so cannot have trespass for cutting the grass on the land, for though he may take the grass by the mouth of his cattle, yet he is not in possession of the land; and no man can have trespass for an injury to lands but he who is in actual possession at the time of the injury done.

§ 5. Livery of seizin can be only to him who has the immediate right of possession. Therefore, if I convey land to A for years, remainder to B for life or in fee, I must make livery of seizin to A who has the immediate right of possession, and he must be considered as the attorney of B to receive livery of seizin for him, and this will actually vest the freehold in B, and the law presumes he accepts it, as it is for his interest.

§ 6. One who bargains and sells for a year must be in actual possession at the time, and if he has it not, he must enter on the land, and on it seal and deliver the deed to the bargainee, and this puts him into possession. And if one is seized in fee and leases for years, unless he gives possession or the lessee enters, he must raise a use on a lease for a year; it being within the statute of uses, there is no need of an actual entry to enable the lessee to take a release, for by the statute he is deemed in actual possession. But if a lease for years be made without any consideration of money, the lessee has no estate till entry; for before entry he has but an *interesse termini* and no possession, neither has the lessor any reversion till the lessee enters and takes possession, nor till this is done will a release operate. But a peppercorn reserved in a lease will raise a use, and then the statute puts the lessee into actual possession and he need not enter, and the reversion will pass by release; but if not within the statute of uses, then the lessee must make an actual entry and take actual possession, as was always usual at common law and before the statute. At any rate the lessee must be in possession by the statute or actual entry to create a privity and take a release of the reversion, and, if by the statute, it is doubtful if he is so in possession as to have trespass before actual entry, though before such entry he is a good tenant to the *præcipe*.

2 Salk. 423.—
2 Bl. Com.
290—5 Bac.
162.—Sid.
361. Barrow
v. Keine.

Lit. sect. 60.
—5 Co. 94.—
Co. Lit. 49.
Lessor cannot make livery against the lessee's will being on the land.
Noy, Max.
80, and livery within view is good if the feoffee enter in the feoffor's life time.—Noy, Max. 80.
5 Wood's
Con. 249—
Cro. El. 446,
447, 463.—
Mod. 263.

2 Mod. 253.—
Co. Lit. 278.

Cro. Jam.
169.—2 Mod.
252, Barkerr.
Keat.—5 Co.
125.

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Co. Lit. 15.

Co. Lit. 48.
Shep. Touch.
213.4 Wood's
Con. 454.—
Bro. tit. Sur-
render.—
2 Rol. Abr. 5.4 Wood's
Con. 455 —
Dyer, 363.

3 Salk. 220.

Cro. El. 50,
Crispe v.
Golding.3 Johns. Cns.
109, Jackson
v. Lunn.

§ 7. A father makes a lease for years to A, rendering rent, and dies, and A enters and the elder son dies before he receives any rent, yet the actual possession of the lessee for years, is the actual possession of the elder brother, and his sister is his heir. So if one enter as guardian to the elder son, this is his possession.

§ 8. Every livery must bring an immediate possession to the feoffee or donee; hence all persons having any lawful estate or possession in the land, as lessee for life or years &c. must join in making livery or be removed from the land. But it is enough if the tenant assent. As if A leases to B for life, and then makes a feoffment to C of the same lands, and makes livery of seizin on it by B's assent and in his presence, it is a good livery to pass the inheritance; for as B permits the feoffor to come upon the land and make livery, "it is a sufficient quitting of possession to him, either by way of surrender or to create a tenancy at will in the feoffor to make the feoffment" valid. But B's servant on the land can give no such assent; while there he can only hold for his master. And all the books agree, that he who makes livery of seizin must when he makes it have "a vacant possession to deliver to the feoffee;" and the livery is good though he tortiously *oust* the tenant to produce a vacant possession, for if there be one, however produced, the livery of seizin operates to pass the land and possession.

§ 9. One may justify taking *damage feasant* on possession only, where the title to the land cannot come in question. As in trespass the deft's. plea was, that he was possessed of the place where &c., and took the cattle *damage feasant*. Plt. demurred. The court said, when trespass is brought and the deft. justifies by a particular estate, he must shew the commencement of it, but the title not in question possession is enough.

§ 10. In this case the court held, that wherever one is alleged to be in possession, it shall be intended he continues his possession till the contrary appears.

§ 11. *After long possession, a grant is presumed.* As where by letters patent a tract of land was granted to A in 1735, laid into lots in 1736; B executed leases of several lots to different persons for lives, reserving rent, in which he asserted his claim to the whole tract, and exercised various acts of ownership until he died in 1752, and his heirs also gave leases of some lots in 1767, and his and their titles continued to be acknowledged by the tenants and not disputed till 1783. B's heirs brought ejectment against C, who had been in possession after 1772. Held, that a grant from the original patentees to B was to be presumed: 2. That entry by him into

part with a claim to the whole was to be viewed as an entry into the whole: 3. That the entry of C was in subordination to B's title; and entry adverse to the legal title is not to be presumed, but must be proved. And entry to avoid the statute of limitations must be made for the purpose of taking possession. *Jackson v. Schoonmaker*; see 7 Johns. R. 5 to 16.

Ejectment; held, a prior possession for less than twenty years forms a presumption of title sufficient to put the deft. on his defence; but the plt's. prior possession must not appear to have been voluntarily relinquished without the *animus reverendi*, and it must appear the deft's. after possession was acquired by mere entry without any lawful right: 2. Where the first possessor died and a descent was cast, and the infant heirs were driven away by a public enemy from their actual possession, the possession was considered by the equity of the *jus postliminii* as revested in the heirs on the removal of the hostile force. As where J. Teller, the plt's. ancestor, in May 1768, entered on the premises as his, where three years before he built a house, and died June 1775, leaving his wife and family in possession, and they kept possession till driven away by the enemy in 1776, that enemy kept possession till 1783; and there was no possession adverse to theirs till 1795, when the defts. took possession, claiming the right fourteen years before this action was commenced. And the court said, and truly, the possession was in Teller's heirs till an actual adverse entry in 1795, their possession continued by fair construction of law.

The defts. shewed only adverse possession less than fifteen years, no prior possession, "nor did they shew title in themselves." "The effect of the evidence was to show a subsisting title out of the plt., and if the deed of 1735 to Mary Van Vleek was not genuine, or if genuine it did not cover the premises (and this was the better conclusion) the defts. did not succeed, unless it be to two eighths of the premises, and for that portion of them the verdict was not taken;"—was for the plt. for six eighths—confirmed. He was the lessor's tenant, they the heirs of Teller.

It may be observed, in this case, the defts. were permitted to shew a title to the premises out of the plt's. lessors to bar him by said deed and by a patent to Kip, Kiersted, and Teller, dated April 10, 1696, from Governor Fletcher, under which the defts. do not appear to have claimed. 10 Johns. R. 331. A stranger not claiming under a mortgage cannot set it up to defeat the legal title.

Possession of goods. Moore, the deliverer at London, ordered the goods to him there from the plt. at Sheffield, Oct. 31, 1788. November 14, they were sent by Royle's waggon

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8 Johns. Cas. 124, *Jackson v. Parker*.—4 Johns. R. 390. 10 Johns. R. 338, 367, *Smith v. Lorillard*.

See *Allen v. Rivington*, 2 Saund. 109, 112.—

In ejectment if it appear by the record of a special verdict, the plt. has prior possession, and no title is found for the deft. the plt. has judgment. And Cro. El. 347.

See Ch. 104, a. 4, s. 6.—Ch. 178, a. 23, s. 17, 25.—Ch. 94, a. 3, s. 6.—2 Johns. R. 230, 235, *Jackson v. Schoonmaker*, a case of the sort,—and what constitutes possession. Mistaking the date of a deed does not vitiate &c.

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3 D. & E.
464, Ellis &
al. v. Hunt
& al.—See
Ch. 25, a. 1.
—Several
cases,
Cooke's
Bankrupt
Laws, 217 to
260. A tem-
porary pos-
session in the
seller for
good reasons,
is no evi-
dence of
fraud. West
v. Skip,
Cooke's B. L.
239, and
other cases.

directed to Moore in England. In the way they were shifted and put into the waggon of the defts. which brought them to the Castle and Falcon Inn, in London, November 22. The plts. drew a bill on Moore for part of the value of the goods, which bill was never paid. The cask and files on their arrival in London were immediately attached by Fenton & Co. creditors of Moore, by foreign attachment, the cask remained at the inn under the said attachment. November 15, a docket was struck against Moore. November 18, a commission of bankruptcy issued against him, and the other defts. appointed his assignees. November 24, John Wells was provisionally appointed assignee of Moore, who the same day demanded the goods in question of the deft., Hunt, the carrier, and put his mark on the cask, but did not take the goods away. November 28, the plts., Ellis & al., hearing that Moore had become a bankrupt, wrote to the agent of Royle's waggon to keep the goods in his warehouse. December 13, the plts. demanded the cask and files of Mott, the master of said inn, and offered to pay him the carriage and to indemnify him, but he refused, and on the removal of said attachment he delivered the goods to the defts'. assignees, of whom they have since been demanded (the action trover), but they refused to deliver them. On the facts the court decided, that the goods had arrived to their destined place; that before the sellers countermanded the goods, Moore by his assignee had taken not a constructive, but actual possession of them by setting his mark on them as far as could be done, the goods being at the inn under an attachment, which prevented his taking any actual possession and moving them, and "that the moment the provisional assignee of Moore put his mark on the goods, the warehouse keeper became the servant or agent of Moore." The goods were no longer in *transitu*.

3 D. & E.
466, Stokes
v. La Riviere.

§ 12. One Duhern, living at Lisle in Flanders, sent an order to the plts. for goods to be conveyed to him; they were accordingly sent by a particular conveyance named by him by the way of Ostend, where before they got to him they were attached by the deft. for Duhern's debt, but not till after the plts. hearing of his insolvency had countermanded the delivery. It was decided, that the constructive possession of the consignee, Duhern, to whose special agent the goods had been delivered in London, for the purpose of being transported to him, was not to be regarded, but there must be an actual delivery to the consignee himself. But why was not the delivery to the special agent of Duhern a delivery to him?

3 D. & E.
466, Hunter
& al. v. Beal.

§ 13. This was an action of trover for a bale of cloth which was sent by Steers & Co. of Wakefield, to the deft., an inn-keeper, directed to the bankrupts (whose assignees the plts.

were.) The innkeeper's agent gave notice to the bankrupts that a bale of goods was arrived for them; and Steers & Co. at the same time sent them a bill of parcels by post, which they received, and wrote Steers & Co., and they had placed the amount to their credit. The bankrupts directed the said agent to send the said bale down to the galley quay to be shipped for Boston; the deft., the innkeeper, sent the bale accordingly to the quay, but the ship being gone it was sent back to him; ten days after the bankrupt's clerk went to the innkeeper's warehouse, when he asked him what was to be done with the bale of goods, and was ordered to keep it till another ship sailed, which would be in a few days. The bankruptcy happened soon after, and Steers & Co. sent word to the deft., the innkeeper, not to let the goods go out of his hands; accordingly when the bankrupts applied for the bale of goods, he refused to deliver it to them. And

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Lord Mansfield held, that though the goods might be legally delivered to the vendees for many purpose, yet as for this purpose (stopping in *transitu*) there must be an actual or absolute and actual possession by the bankrupts. A delivery to a third person to carry to them is not sufficient.

Buller J. held, that as between buyer and seller the goods may be in the vendee's possession the instant they are delivered to a carrier named by him; but still if the vendee become insolvent they may be stopped in *transitu* till they come to his actual possession by the vendor, on the equitable ground stated chapter 25. These cases turn more on a principle of equity than of possession.

3 D. & E.
467.—See
Ch. 25, a. 1.

§ 14. He who has the general property has the possession in law, for the general property of a chattel draws to it possession, so that if one at London buys goods at York, he can support trover for them, but if he rests his claim on special property he must prove an actual possession.

5 Bac. Abr.
290.

§ 15. *A party cannot enter under one title and then set up another.* As where A died seized in 1771, leaving a widow and an only son, his heir at law, and a daughter. The widow entered into possession of the land and the daughter married B, and the widow permitted him and his wife to occupy a part; he continued in possession, claiming to hold in right of his wife. The heir brought ejectment against B. Held, 1. The law intended the widow entered as a guardian in *socage* to her infant son and the heir: 2. That B, the deft., having entered by permission of the guardian and under the heir's title, could not set up a title in a third person in contradiction to the title under which he entered.

7 Johns. R.
157, Jackson
v. De Walt.

ART. 8. *Entry and possession as to mesne profits.*

§ 1. If one be disseized of lands, and having a right of en-

See Ch. 172,
a. 6, s. 15.

CH. 132. *try*, enters into the same, his entry turns the *disseizin into a trespass*; and he may recover the *mesne profits* of the disseizor in an action of trespass, now viewed as a trespasser, so far as not barred by the statute of limitation. So if one sues for lands and recovers them, and has possession by entry or execution on the judgment, he may recover the mesne profits as above, if he has a right of entry other than the judgment to recover gives him.

Art. 8.

3 Wils. 129.
—2 Burr. 688.
—6 Com. D.
377.—2 Roll.
550, 554, 559.
—3 D. & E.
17, 547.

§ 2. If a disseizee re-enter, he then has trespass against the disseizor with a *continuando* for the whole time of his possession; so against a stranger for a trespass done during the disseizin, “for by re-entry he revests the possession in himself *ab initio* ;” and so against the lessee, donee, or feoffee of the disseizor. So if one sells his land, he has trespass for a wrong before done. So if he cannot re-enter, because his estate is ended, as if tenant for another life &c. But in all such cases there must be a *right of entry* and to take the mesne profits in the plt. at the time of the *disseizin*, otherwise he has no right to turn it into a *trespass* upon his lands. In Pennsylvania and Delaware they may be recovered in the action of ejectment. 3 Dall. 138.

12 Mod. 138,
Donford v.
Ellys.

§ 3. The plt. recovered in ejectment and the deft. brought error, after which the plt., pending the writ of error, brought trespass for the *mesne profits* and recovered.

2 Wils. 115,
Holdfast v.
Morris.

§ 4. The plt. recovered, in ejectment, against the casual ejector, and then brought this action of trespass for the mesne profits against the tenant in possession; deft. offered to pay money into court, but refused, for said the court, this is trespass for a *tortious* occupation, and not like the action on the case for use and occupation, which is on contract.

3 Wils. 118,
121, Goodtitle
v. Tombs.

§ 5. Held, if one tenant in common recover in ejectment against another by default, trespass for the *mesne profits* lies. Curia,—before H. 7, the plt. in ejectment did not recover the *term*, but the *mesne profits* as damages, but when the term came to be recovered, then only *nominal* damages, but not the *mesne profits*; hence this action of trespass for them was introduced. This action is not confined to the *mesne profits* only, but for trouble &c. not merely the rent. And Gould J. said an *actual ouster* is intended, and that the deft. kept the plt. out “from the time of the demise till the judgment in ejectment,” and proof of this judgment, “and the writ of possession executed were sufficient in this case to warrant the verdict for the mesne profits.”

2 Burr. 665 to
669, Aslin v.
Parkin, cited
5 Bac. 212.—

§ 6. This was trespass for the *mesne profits* by the *nominal* plt. in ejectment, against the tenant in possession; the plt. gave in evidence, the judgment in ejectment, the writ of possession and return on it, the deft.'s occupation of the premises,

their value, &c. Held, on verdict the plt. proves his right, CH. 132. by default it is confessed, the tenant is *concluded* by the judgment, and so cannot deny the plt's. *possession* from the defendant. But this judgment, like others, only concludes the parties as to the *subject matter* of it. "Therefore, *beyond* the time in the demise it proves nothing at all." "Beyond that the plt. has alleged no title, nor could he be put to prove it." "As to the *length of time the tenant has occupied*, the judgment proves nothing, nor as to the value;" by all the judges of England. See Ch. 178, a. 14, s. 19.

§ 7. Plt.'s lessor brings trespass for the mesne profits in the minimal plt's. name in the ejectment; judgment by default against the casual ejector. The plt. must prove *actual possession* in himself.

§ 8. A *bankruptcy* is no plea in bar to an action of trespass for the *mesne profits*. Admitted that after judgment, in ejectment, the party may waive the *trespass* and bring case or *use and occupation*. Lord Mansfield, "the form of the action is decisive, the plt. goes for the whole damages occasioned by the tort," which are uncertain, and must be ascertained by a jury.

§ 9. Held, that in trespass for *mesne profits* the jury may, also, include the costs of the ejectment; but if they do not, this omission is not cause of a new trial.

§ 10. Held, that damages, as mesne profits to one, die with him, for they arise from an injury in the nature of a trespass.

§ 11. This was an action of trespass for *mesne profits*; the plt. had recovered judgment for possession, in a writ of entry for twenty-three seventieth undivided parts against the deft., and in that writ the plt. alleged the deft. had no entry, but after the disseizin of one Lemuel Cox, donee to the plt. within 30 years before the date of the writ. Judgment for the plt. for their possession &c. This disseizin, by Cox to the plt., was *above twenty years* before their writ of entry was served on Callender and Cox, and those under him had quiet possession above twenty years next before the date of said writ of entry: judgment for deft. in this action for *mesne profits*, because the plt's. *right of entry was gone when they sued their writ of entry*; and the court said "to maintain trespass one must have a *right of entry*, and perhaps an actual entry is necessary. When a disseizee enters, *having a right of entry*, he changes the *disseizin into a trespass*." In this case Callender had had the possession above six years before trespass brought, and as he was *grantee* of Lemuel Cox, the disseizor, it would have been a question if this action could have been supported against Callender, if the plt. had had a *right of entry*, when they sued their writ of entry, because


CH. 132.
Art. 8.

1 Phil. Evid.
255.—See 3
Campb. 455.
Hunter v.
Brill.—6 Bin.
150, Bailey &
al. v. Fairplay.
—13 John R.
229, Jack-
son v. Havi-
land.
5 Bac. 212,
Stanynought
v. Cosins.

Dougl. 584,
Goodtitle v.
North.

2 D. & E.
261, Gulliver
v. Drink-
water.
Salk. 252,
Mordant v.
Thorold.—
9 Mass. R.
533, Cox &
al. v. Callen-
der.—Bul. N.
P. 86, 87.—
11 Co. 51,
case of Lif-
ford.—
Cro. El. 540.
—Hob. 98.—
7 D. & E.
727.

CH. 132. Callender came in by title as *grantee*. The authorities are both ways; not liable according to Lord Coke, and Hobart and Clench, Cro. El. 540; but was liable according to a majority of the judges in Cro. El. 540, Holcomb v. Rawlyns; and so according to 3 Bl. Com. 210, where it is stated that

Art. 8.  3 Bl. Com. 210. "an heir, before entry, cannot have an action against an abator: though the disseizee might have it against the disseizor, for the injury done by the disseizin itself, at which time the plt. was seized of the land; but he cannot have, for any act done after the disseizin, until he hath gained possession by re-entry, and then he may well maintain it for any intermediate damage done; for *after his re-entry the law, by a kind of jus postliminii supposes the freehold to have all along continued in him.*" Now, if on re-entry (and clearly, there must be a right to re-enter) the law supposes the disseizee, by a kind of *postliminy*, always in possession, then any possession adverse to his must be a tort and trespass, and the subject of an action of trespass. Coke, in this case, lays down the same principle, as to the disseizor; but adds "if my disseizor makes a feoffment in fee, gift in tail, lease for life, or years, &c. and afterwards I re-enter, I shall not have trespass *vi et armis* against those who came in by title; for this fiction of law that the freehold continued always in me shall not have relation to make him, who comes in by title, a wrongdoer *vi et armis*, for in *fictione juris semper acquitas existit*; but in such case I shall recover all the mesne profits against the disseizor." 2 Roll. 554 contra, Cro. El. 540 contra, Moor, 461 contra; so Coke says, p. 51, "if my disseizor is disseized and afterwards I re-enter, I shall not have an action of trespass against the second disseizor, because the said fiction of law, as to actions, extends only to my disseizor." 2 Roll. 554, and Cro. El. 540, contra.

11 Co. 61,
Lifford's case.

9 Mass. R.
508, 509,
Wells v.
Prince.

§ 12. This was a petition for partition of lands in Boston. Francis Wells, seized in fee, devised to his wife for life, remainder to the petitioner and others, and died in 1766. Wife never entered, and she died in 1793; the petitioner entered in 1808. The court held, the wife's neglect to enter for above 20 years, amounted to a refusal of the devise, and so a right of entry accrued to him in remainder after the twenty years expired, yet another right of entry accrued to him on the death of the tenant for life; and he had his election to enter on the refusal of tenant for life to accept the devise, but was not obliged to do so, but might enter, said the court, "after his second right accrues by the death of the tenant for life;" and "the petitioner then had not lost his right of entry on the death" of the wife, and so entitled to partition. Two material points are clearly decided in this case, 1st, One who has a right of entry may have a petition for partition, notwithstanding

standing Bonner's case 7 Mass. R. 475 : 2. Though the tenant for life neglect to enter above twenty years, yet on his death he in remainder has a *right of entry*; and this is according to the statute, which provides, if any one neglect to enter twenty years after *his right of entry* accrued, then barred &c.—Tenant for years may petition for a partition though the other party holds in fee. 15 Mass. R. 155.

CH. 132.
Art. 8.

§ 13. A man who has a judgment for possession may enter without a writ, is clear ; “and why should the Commonwealth which cannot be disseized, the whole people, require the aid of an officer to give them actual possession, when it is not necessary in the case of an individual ?

4 Mass. R.
300, in M'Neil
v. Bright.

§ 14. A remainder-man after an estate for life, cannot maintain an action for the *mesne profits* before an actual entry.

7 D. & E.
727, Com-
pere v.
Hicks.
Willes, 343,
in a note.

§ 15. If he who has title enters and avoids a fine, he can recover only the *rents and profits* accruing *after his actual entry* in a court of law ; but from the *commencement of his title* in a court of equity. And 7 D. & E. 727.

§ 16. Trespass for the *mesne profits* on the Betterment act of 1807, c. 74. Held, that after judgment in a real action establishing the demandant's title to the land, and the jury inquired of the value of the land, and of the improvements pursuant to said act, no action lies for the *mesne profits*, whether the demandant elected in the former action to abandon the premises demanded, or to pay for the improvements ; but would have been entitled to the *mesne profits* but for said act.

12 Mass. R.
314, Jones v.
Carter.

§ 17. A forcible entry on land, or an *actual ouster*, is not necessary to make a disseizin. As where one tortiously enters on new or vacant land, claiming it as his, it is a disseizin ; and this is not purged, though he appoint an agent to obtain a deed from the owner to the disseizor, if the agent take it to himself, and nothing passes by it.

15 Mass. R.
495.

§ 18. *When the lessor may re-enter.* Ejectment to recover premises demised. Held, if it be provided in a lease the tenant shall not demise, lease, grant, or let them, or any part thereof, or convey, alien, or assign the indenture, or his estate therein, to any person for all or part of the term, without the lessor's license in writing ; and the tenant without license agrees with a person to be his partner, and that he have the use of the back chamber and some other parts *exclusively* and the rest jointly with the tenant, and lets him in, the lessor may re-enter.

1 Maule &
Sel. 297, 298.

CH. 133.
Art. 1.

CHAPTER CXXXIII.

ESTATES FOR YEARS, AT WILL, SUFFERANCE, AND OTHER CHATTEL INTERESTS.

ART. 1. *General principles.*

See Ch. 76,
property va-
riously quali-
fied. More of
leases, see
Ch. 110, a. 3.
—1 Cruise,
251 &c.

§ 1. It will not be necessary to enlarge much on this head :
1. Because we have but very few leases for years or at will in this part of the country : 2. Because in Ch. 55, *Assumpsit* for Use and Occupation, and in Ch. 151, *Debt* for Rent, this subject is and will be pretty fully considered. So under the heads of *Emblements*, *Covenants*, and *Conveyances by Leases*, *Leases and Releases*.

2 Bl. Com.
385, 386, 387.
—2 Com. D.
130, 141.—
2 Cruise, 504.
—1 Cruise,
251, 252, 253.

§ 2. These estates *for years, at will, or by sufferance*, are all less than freehold estates. They are a mere *chattel* interest, or goods real or personal. A chattel real stands in opposition to *fief* or *feud*, being interests issuing out of, or annexed to real estates ; and they have one quality of real estates, that is, *immobility*, but want the other quality of real estates, to wit, sufficient legal indeterminate duration. The utmost period they can last is fixed so many years, or till such a sum be raised out of them ; and in England they include estates by statute merchant, statute staple, and *elegit*, as well as for years, &c. They are in one sense in opposition to chattels *personal*, which are moveable, and may be carried with the owner wherever he goes.

Imp. M. P.
167.—11 Co.
48, 49, Lifford's case.

§ 3. Timber growing on land is a mere chattel, and may be sold by *parol*. But according to Lifford's case, if A seized in fee of land, grant it to B for life, except the trees, they remain part of the inheritance, and are not a *chattel*, and p. 49, if I grant all my trees in black acre to A and his heirs, he has an inheritance in them without any livery of seizin, and not a chattel interest.

3 Salk. 160,
161. And
trover lies for
cutting stand-
ing corn. 15
Mass. R. 204.

§ 4. *Corn standing is a chattel*, and if cut and carried away in the testator's life time, his executor must bring *trespass* where the mowing and carrying it away was one entire act. But if the cutting was at one time, and the carrying away at another, then they are distinct acts, and he must sue for the carrying away only. But *grass* growing is a part of the freehold, and not a chattel. And so the executor cannot sue for mowing it and carrying it away in the testator's life time. Where a term for years merges in the freehold. 1 Cruise, 263.

§ 5. A lessee of lands and buildings is not liable for *natural* decay, but he to whom the use of a thing is granted or leased is bound to repair it, unless there be a stipulation to the contrary.

§ 6. If a man take a lease of a house and land for years, and covenant to leave the demised premises in good repair at the end of the term, and erects a house on part of the land besides what was there before, he must keep and leave this also in good repair. So if the lessor covenant to repair *during the term*, and will not do it, the lessee may repair, and repay himself by way of retainer. And if the house leased be burnt by sparks from the lessor's chimney, the lessee is excused repairing. If the lessee agree to pull down three old houses and erect three new ones on the premises, and to leave the said premises and houses to be erected thereon in repair, and he erects five new houses, he must leave *all five* in good repair at the end of the term. They become a part of the land and estate, and are included in the premises. A lease is always of a less estate than the lessor has; for if of his whole interest, it is properly an assignment. And a lease for years is always for some fixed period, and is a contract for the possession.

ART. 2. *Estates at sufferance and will.*

§ 1. The estate of a tenant at *sufferance* is so slender, that he cannot take a release from the lessor, for such tenant has but a possession without privity.

§ 2. "An estate at sufferance is where one comes into the possession of land by lawful title, but keeps it afterwards without any title at all." "As where a man takes a lease for a year, and after the year continues to hold the estate without any fresh leave from the owner." So where the lessor *at will* dies, and the lessee continues in possession, he becomes tenant at sufferance. The owner of the land may destroy the estate of this tenant at sufferance whenever he chooses to enter. But this owner cannot have trespass against the tenant at sufferance before entry, because such tenant comes in by legal title, and is supposed by law to continue by legal title, "unless the owner by some public act, such as entry is, will declare his continuance to be wrongful." Owners must, in these cases, make formal entries upon their lands, and recover possession by legal process. "And at the utmost the tenant was bound at common law to account for the profits of the lands by him detained." So if tenant for B's life hold over after he is dead. 1 Cruise, 293.

§ 3. It is a general rule, that "if a tenant holds over after the expiration of his term, without having entered into any new contract, he holds upon the former terms." This rule

CH. 133.
Art. 2.

3 Wood's
Con. 583.—
Hob. 40 —
Doug. 748.
3 Wood's
Con. 582, 583.
—Leon. 237.
—Rol. Abr.
464.—5 Vin.
244 —5
Wood's Con.
127.—2 Bl.
Com. 317.
No use re-
sults on the
grant of a
term. 1
Cruise, 154.

5 Wood's
Con. 251.—4
Cruise, 148.
—1 Cruise,
283, 284.—2
Bl. Com. 150,
151.
Co. L. 55, 56,
57.—1 Cruise,
284. Notice
not neces-
sary. 1 Cruise,
285. Ch. 172,
a. 3, s. 13, 26.

Tenant for
years may be
restrained
from alien-
ation. 2
Cruise, 10 —
4 Cruise, 606.

5 D. & E.
472, Doe v.
Bell, per
Lord Ken-
yon.—2 Ch.
on Pl. 133.

CH. 133. results from the nature of the transaction; for both parties
 Art. 2. keep on, and neither proposes any alteration of terms. The
 inference then is, they mean to adhere to the former terms.
 But the action is *assumpsit* after the covenant is at an end.
 And *Harding v. Crethorn*.

Co. L. 57, 271.—4
 Com. D. 65. § 4. If a guardian continue in possession after the heir
 1 Cruise, 13, comes of age, he is an *abator*, and not tenant at sufferance,
 109, 248, 249. for he comes to the estate by act of the law. The possession
 of tenant for years is that of the heir. Cannot bring trespass
 or ejectment before entry. Nor can he grant if dispossessed.

Co. Lit. 55, 56.—2 Bl.
 Com. 145.—
 Lit. 2. 48.—
 5 Wood's § 5. *At will. Lessee at will* "is one in possession of tene-
 Com. 251.— ments by force of a lease thereof made to him, to hold at the
 Co. Lit. 55. will of the lessor or of the lessee; for if it be at the will of
 —5 Co. 14, one of the parties, the law implies it shall be at the will of the
 case of other also." Though tenant at will has no estate he can assign,
 Shrewsbury. yet he has some estate, and such as enables him to take a
 release from the lessor at will, and of course such an interest
 or estate as is the ground of *privity* between them. Lessee
 at will is not liable for *negligent* waste, but is liable in tres-
 pass for *voluntary* waste, or any act the owner only can do;
 for this determines the tenant's will.

5 Wood's § 6. If A make a lease to B during the pleasure of A or B,
 Com. 127.—4 or both, this is a lease at will. So if by the old law it made
 Com. D. 68, a feoffment to B in fee, in tail, or for life, before livery of
 59, 60.—1 seizin, B had but an estate at will; but on a void bargain and
 Cruise, 269. sale, B has no lease. "If lessee at will sow corn, or flax, or
 275. See Ch. hemp, or set roots, or any other thing that yields a present
 109, a. 4, s. 2. annual profit, and the lessor ousts him before it be ripe, the
 lessee shall have free entry to cut the same and carry it away."
 But otherwise if the lessee for years sow corn, because he
 knows when his lease will end.

5 Co. 116.— § 7. If lessee for years or at will, plant young *fruit trees*,
 Co. Lit. 55, or oaks, elms, &c., or sows *hay-seed*, which yield no present
 56. annual profit, the lessor shall have them. See more as to the
 crop, head *Emblements*, Ch. 76. The lessor determines his
 will, when he comes on the land, and warns the lessee not to
 occupy; or when without consent he cuts down a tree &c.,
 or puts in his beasts &c. So words spoken to this purpose, if
 the lessee has notice of them.

5 Co. 9, 10, § 8 A woman, tenant for life, leases to A at will, and mar-
 Henstead's ries, the marriage does not determine the estate at will, but
 Case.—1 Wil- the husband may do it when he pleases. The same if she
 son's Bac. be tenant at will and marries. So if there be three tenants at
 Abr. 483.— will, and one dies. When liable for rent, see *Rent*.
 Co. Lit. 55.

2 Bl. Com. § 9. *Year to year*. "If lessee at will, paying rent quarterly
 147.—1 or half yearly, determine his will, the rent shall be paid for
 Cruise, 275, 276.—3 Burr. 1609.

the whole current quarter, or half year, &c. Where no certain term is mentioned, the courts do not incline to construe the lease at will, but rather a lease from year to year, as long as both parties agree, especially where an annual rent is reserved, in which case they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other."

CH. 183.

Art. 2.

§ 10. A leased to B for a year, and from year to year, as long as it should please both parties. This is a lease for two years, and afterwards at will. If A demise lands to B for a year, and so from year to year, it is a lease for every particular year. After the year is begun, the deft. cannot determine the lease before the year is ended. But in a lease at will the deft. may determine the lease before the year is ended, and after the payment of his rent at the end of a quarter, but not the beginning, lest the lessor should lose his rent. Nor can the lessor determine his will in the middle of a quarter, without permitting the tenant to have the emblements, or losing the rent—or tenant paying his rent if he determine his will.

Salk. 413,
414, Haths
v. Ash.

§ 11. Per Holt C. J. Where a lease is made at the will of the lessee after a quarter is commenced, he may determine his will, but then he must pay the quarter's rent. And if the lessor determines his will after the quarter is commenced, he shall lose his rent for that quarter. But if a lease be made from year to year, as long as it pleases both parties; in such case, after a quarter is commenced, neither the lessor nor lessee can determine his will for that year, because they have willed the estate certain for that year.—And 2 Lord Raym. 1108, *Title v. Grevett*.

3 Salk. 222,
Layton v.
Field.

§ 12. Held, if A be possessed of a term of years in black-acre, and grant it to C, (not saying, and to his executors, nor for what term or interest), in such case C is only tenant at will to the grantor; but if he devise black-acre to C, the whole estate passes; for if it should be an estate at will, it would either never begin, or determine as soon as begun.

3 Salk. 222,
Germaine v.
Orchard.

A license to take the profits of my land is a lease at will, and if to take them for a year, it is a lease for a year. 3 Salk. 223.

A tenant at will of a dwelling house shall have a reasonable time and free egress and regress to remove his goods, after the lessor's will is determined. Sul. 187.

§ 13. As to what are leases *at will* or *from year to year*, see American Precedents, 46, 47,—and leases, conveyances, and s. 16.

§ 14. An estate at will may be determined not only by express declarations made known to the other party, but by giving a deed or lease for years to commence immediately, 2 Bl. Com. 146.—1 Cruise, 278.

CH. 133. or by desertion of the tenant, his assigning to another, or by
Art. 2. his committing waste. So the death of either party puts an
 end to the estate.

4 Com. D.
 59. —Salk.
 588.—1 Wils.
 176.

§ 15. If tenant for years continues after his term, and his rent is paid and accepted as before, he is tenant at will. And if A licences B to take the profits of his lands, B is tenant at will. So one who enters and enjoys lands under a void lease and pays rent, is tenant at will, and not a disseizor. The lessee at will need not repair. And reserving an annual rent usually turns a tenancy at will into an estate from year to year.

Lit. s. 82.—
 1 Co. L. 55.—
 1 Cruise, 270.

§ 16. Littleton says, if A lease lands to B to hold to him and his heirs, at A's will, the words, *to his heirs*, are void. So if a lease be made for years, with a *proviso* the lessor may enter at his will, this is at will. See *Cudlip v. Rundle*.

1 Cruise, 270.
 —Mayn 4.—
 Brownl. 30.

§ 17. Estates at will may arise by implication as well as by express words. As if tenant for years hold over his term, and continues to pay rent quarterly as before, such payment accepted will amount to a lease at will.

Lit. s. 70.
 cited 1
 Cruise, 271.

§ 18. So if A make a feoffment to B, and deliver him the deed, but does not give him livery of seizin, and B enters, he becomes tenant at will.

1 Wils. 176.
 See Ch. 110.
 a. 3, s. 16.

§ 19. So if A enter and enjoy under a void lease, and pay rent, he is tenant at will. Every lease at will is at the will of both parties.

Cro C. 302,
Blunden v.
Baugh. 1
 Cruise, 272,
 273.

§ 20. If lessee at will lease for years, and the lessee enter, this is but a disseizin at election, and not *prima facie*: and if a disseizin, it is the disseizin of the lessee at will, and he gains the freehold. As to *voluntary* waste by tenant at will, trespass lies against him. As to permissive, there is no remedy, but on contract. Any act of ownership done on the land by the lessor at will, as cutting down trees &c., and any act by the lessee inconsistent with the estate at will, puts an end to it.

5 D. & E.
 471, *Doe v.*
Bell.—1
 Cruise, 277.

§ 21. *An estate from year to year.* In favour of this courts lean. Hence if an agreement for above three years be made by *parol*, so void as to the time, is a tenancy *from year to year*, regulated in every other respect by the agreement.

7 D. & 478,
Doe v. Wel-
ler.

§ 22. Tenant for life granted a lease for years void against the remainder-man, and he received rent from the tenant; held, it was a tenancy *from year to year*. See *Birch v. Wright*, Ch. 55, a. 2, s. 9. Estate goes to the executor &c. See *Doe v. Porter*, Ch. 29, a. 4, s. 9. And must be six months' notice in England, *id.* There is a privity of estate between a tenant *from year to year* and the owner.

1 H. Bl. 311,
Zouch v. Wil-
lingale. Ch.
 178, a. 33.

§ 23. Making a distress for rent on a tenant *from year to year* after notice to quit, is a waiver of it; as this making the

distress is an act not to be qualified, and an express confirmation of the tenancy. 6 D. & E. 219. CR. 133.
Art. 3.

ART. 3. *Biens, or goods and chattels.*

§ 1. These, as above observed, are real and personal, and in the largest sense include all kinds of property, except estates of freehold and inheritance; but in a more restricted sense they do not include rights or credits. Hence, our probate bonds are to account for goods and chattels, rights and credits. All terms or leases for years are chattels; so is the guardianship of a ward by tenure or by assignment of him of whom the lands are holden. So is a slave or villien in gross for a term of years: so was the year, day, and waste, where one was attainted of felony: so are cattle, household stuff, and all moveable property lying in possession and occupancy, fowls tame, fish in trunks, trees sold or severed. But in the English and our law, the inheritance or freehold of lands or tenements are not biens or goods, or chattels, though in the French law they are *biens immeubles* and *meubles*. So inheritances in the British plantations are chattels for the payment of debts. So in the Roman law, *bona* signified "*estates*," *bona mobilia* and *bona immobilia*.

§ 2. So where the king granted £1000 a year out of the four and a half per cent. Barbadoes duty, with collateral security for payment out of other revenue, this was held to be a mere personal annuity, having no relation to lands or tenements, nor partaking of the nature of rent, yet descendible to heirs. Though a freehold or an inheritance never goes to an executor of administrator, yet goods and chattels often go to the heir with the inheritance, as heir-looms or fixtures annexed thereto; (see Heir-Looms and Fixtures, Trees, &c.) such as glass in windows, the doors and locks of the house, poles, furnaces, coppers, grass growing, fences, and even materials for fences as appertaining to the inheritance. So wainscot work fixed, pictures, &c.; so even millstones fixed to a mill or removed to be picked. So salt-pans go to the heir. As to a cider-mill the law seems to be unsettled. So a term for years to attend the inheritance goes to the heir. So do deer in a park, conies in a warren, and doves in a dove-house, and so fish in a pond. So do apples and other fruit growing at the death of the ancestor; and so does a tombstone; so do deeds and other evidences of lands with the chests that contain them; but hangings and iron backs to chimnies, it is said, go to the executor. So annual roots, as carrots, &c. within the soil. Every thing annexed to and consolidated with the inheritance goes to the heir. Toller's L. of Ex. 176, 192.

§ 3. If a debt be owing to A, and in satisfaction of it his debtor grants him an annuity on lands for his own life, and

Goods, *bona*, include chattels, as terms &c. in 22 & 23 Ch. II. c. 10—Sugden, 496, 497.—Co. Lit. 118.—Off. Ex. 74, 75, 76, 81.—2 Com. D. 130.

Jus. Inst. lib. 3, tit. 10, 11, 12, 13; lib. 4, tit. 2.

2 Vesey, 170, Stafford v. Bulkeley.

2 Bl. Com. 121.—2 H. Bl. 259.—3 Bac. Abr. 64.—Co. Lit. 8.—1 Rol. 916.—Off. Ex. 69, 84, 89.—Toller's L. of Exrs. 176.—Stra. 1141, Harvey v. Harvey.

1 Vesey, 402, Longuet v. Scawen.

CH. 133. redeemable, this annuity is part of A's personal estate. So
 Art. 3. statutes, recognizances, obligations, securities, and contracts

4 Co. 65,
 Fulwood's
 case—Tol-
 ler's L. of
 Exrs. 176,
 192.

for money, and all chattels, in action as well as in possession, are personal estate, and go to the executor, except there be a special custom to the contrary, and by such custom they may go to the successor, as the chamberlain of the city of London, and so as to corporations aggregate.

9 Mass. R. 74.

§ 4. It is stated that the property of goods and chattels which go to the executor or administrator, or to the heir, or paraphernalia to the wife, on the death of the owner vests in them, but not absolutely, for such goods and chattels generally remain liable to be taken for the debts of the deceased, even though the executor or administrator charge himself with them. Plate passes as household furniture. Sudeg. 115.

2 Rol. 59.—
 1 Leon. 263.
 —4 Leon. 22.
 —2 Cro. 60.

§ 5. If one grant all his goods and chattels, a term for years, he has in the right of his wife, passes. So goods he has as executor, and so an *interesse termini*; so if he grant all his goods and chattels and delivers possession of goods his wife had as executrix or administratrix, the goods she had pass.

2 Stra. 955,
 Smith v.
 Smith.
 Toller's Law
 of Exrs. 233.

§ 6. But a parol gift of goods, without some act of delivery, will not alter the property; and such act is necessary to establish a *donatio causa mortis*. This vests neither in the heir, executor, or widow. It is thus created: the testator in his last illness and expecting death, delivers to A possession of any personal effects to keep in the event of death, and therefore it is called *donatio causa mortis*. But it is on the implied trust, that if the testator lives, the property shall revert to him, as it is given but in the contemplation of death. 2 Bl. Com. 514; 2 Ves. jun. 120. There must be an actual delivery of the thing into the donee's hands by the donor himself, or by his order, except when a corporeal delivery is not practicable. Hence, a ship at sea may be delivered by the delivery of the bill of sale defeasible on the donor's recovery, or perhaps by deed or writing only may this gift be effected. So the delivery of the key of a warehouse containing the goods is such valid delivery of them. 2 Ves. 434. So of the key of the trunk is a delivery of it. 2 Ves. jun. 116. And these are not symbols but modes of attaining possession. 2 Ves. 443. So a bond given in prospect of death, though a *chose in action*, is a *donatio causa mortis*; for a property is conveyed by the delivery. 2 Ves. 441; 4 Bro. Ch. R. 72; 3 Atk. 214. So of bank notes &c. 1 P. W. 404; but not promissory notes, bills, or checks on bankers; these are not like bonds, 2 Ves. 442; for the bond is itself a specialty and the foundation of the action, the destruction of which destroys the demands; but notes, &c. are only evidences of the contract. 2 Ves. 442. Nor shall a delivery merely *symbolical*

2 Ves. jun.
 111 to 121,
 Tate v Hil-
 bert.

Toller's L. of
 Exrs. 235.

such operation, as a deed of gift not to operate till after donor's death, and 6d. delivered to put the grantee into possession. 2 Ves. 440. So stock itself must be transferred. 1. 431. A mere *parol* gift without any delivery has no effect. 2 Ves. jun. 120. So an absolute gift, for it must take effect only on the donor's death. Id. Hence, a note absolute and immediate is no *donatio causa mortis*. 2 Ves. jun. 111. One's bill on his banker with an endorsement expressing assent for the donee's mourning with directions as to it, held to be a *donatio* &c., as it supposed death. 2 Ves. jun. 111. If donor die, the donee's interest is well vested, and his gift cannot be proved as a part of a will, nor need the executor assent to it. 2 Bl. Com. 514. But this kind of gift never prevails against creditors. Id.; and 2 Ves. jun. 150. A bond &c. delivered, is not testamentary. 2 Ves. jun. 113. A voluntary gift may be sued, and clearly a voluntary bond.

7. Goods were bought by the vendee's agent for the vendor, and delivered to the vendee's packer, in whose hands they were attached by the vendee's creditors. Held, the property of them re-vested in the vendor so as to avoid the attachment, on the vendee's having countermanded the purchase by letter dated before such delivery to his agent, though the letter was not received till afterwards, the vendor assenting to take back the goods. The vendee became insolvent in New York in fact, before the goods were bought in London, but not bankrupt.

§ 8. In this case also the court held, that a contract of sale may be rescinded by the consent of the vendor and vendee before the rights of other persons are concerned. But when the vendee wished to return the goods, and the vendor attached them in the packer's hands as the vendee's property, it was considered the vendor elected not to rescind the contract. And the vendee having since become a bankrupt, it was held, the vendor could not recover the goods from the packer in bankruptcy. In both cases the goods were actually delivered to the agent of the vendee, Dewhurst. But one party alone cannot rescind.

§ 9. But the property of goods and chattels is not vested in one who tortiously takes them, as if thieves or pirates seize goods, the property is not vested in them. And if the pirate sell goods to A piratically taken, the owner may take them. Nor is the property changed, though the wrongdoer sell the goods to the owner himself; or the wrongdoer dies in possession, for a descent does not take away a right to goods. And see *Goodall v. Shelton*, and *Owenson v. Morse*, Ch. 11, a. 2.

§ 10. *Nullus in bonis feræ naturæ*. None can have an absolute property in *feræ naturæ*, as deer, conies, doves, her-

CH. 133.
Art. 3.

5 D. & E.
211, 215,
Salte v.
Field.

5 D. & E.
402, 405,
Smith v.
Field.

5 East, 449.

2 Com. D.
134, 135.—
3 Buls. 29.—
Doct. & Stud.
90.

7 Co. 16, 18.
—See Ch. 76,
a. 9.—2 Com.
D. 135, 136.

CH. 133. ons, hawks, pheasants, or other fowls which are at large and not reclaimed, nor in fish at large in the water, nor in swans
Art. 4.

—Hob. 283.
 —2 Cro. 44,
 463.—See
 Fere Natu-
 re.

2 Bl. Com.
 391, 392, 393.

at large and not marked, but one may have a qualified property in them when tame or reclaimed, as doves in a dove-cote, young herons &c. in their nests, fish in a trunk, and if reclaimed, he may have trespass. But if any of these attain their natural liberty and have no inclination to return, the property shall be lost. See Emblements, Trees, &c. Some wild animals are not objects of property at all, and in some is a qualified property, as where wild by nature but secured and made tame, as rabbits, doves, fish, &c.; these are one's property so long as he keeps them in his actual possession, and they are viewed as in his possession so long as they have a disposition to return known by their usual course of returning. See Property Qualified, especially Ch. 76, a. 9; and Ch. 72. What is a good mortgage of goods and chattels, see Mortgage. And for the several kinds of qualified or defeasible property in them, see Ch. 76, a. 1 to 10, *Baron* and *Feme*, Executors and Administrators, Factors, Liens, &c.

12 Co. 1, 3,
 Ford & Shel-
 don's case.

§ 11. Where an act of parliament declared a man's goods to be forfeited for *recusancy*, it was said by one accused, that "debts are not included in the word *goods*;" and hence if the king grant all the goods of one attainted, debts due to him pass not, for the grant extends only to goods in possession, and not to things in action, especially in a penal law, not to be extended by equity. But the court decided, that "personal actions are as well included within the word, *goods*, in an act of parliament, as goods in possession." "Joint interests in chattels, goods, debts, covenants, and contracts, shall go to the survivors." But not so as to merchants or traders.

Co. Lit. 182.

ART. 4. Chattel interests by several.

4 Com. D.
 53.

§ 1. If parceners or joint-tenants join in a lease, it is but one lease, as they have but one freehold.

2 Rol. 64.

§ 2. But if tenants in common join a lease, it shall be several leases of their several interests.

Co L. 45.—
 1 D. & E. 86,
 Ludford v.
 Barber.

§ 3. If A and B make one lease of their several lands, it shall be several leases of their several estates, and a confirmation of each of the lease of the other; and the lease operates to convey the possession of each severally to, and to vest the interest of each in the lessee for the term. So if tenant for life and the remainder-man or reversioner in fee join in a lease, it is a lease of the first for his life and confirmation of the other. And after the death of the tenant for life, it is the lease of him in remainder or reversion. This is the legal operation. So if the owner of the land and a stranger join in a lease, it is a lease of the owner alone and the confirmation of the stranger.

§ 4. But this construction does not hold where no estate or interest passes by the lease ; but the deed is only a covenant. Hence, it is often material to inquire if the deed be a lease that operates to vest an estate or interest in the lessee, or a mere covenant that vests no estate or interest, but is only a ground of action. But any words that amount to a grant may make a lease and vest a term. As if A covenants, grants, and agrees that B shall have black-acre for five years, and B covenants to pay rent, it is a lease, and vests in B a term for five years.

CH. 133.

Art. 4.

Hob. 35.

§ 5. A and B, joint-tenants for life, A by indenture covenanted, agreed, and granted to and with the deft. that he might hold and enjoy after the death of B the moiety for sixty years, if A live so long, and demised and granted the other moiety after the death of said A for sixty years, if said B so long lived ; B survived A. Held, not to be a good lease for any part ; but held, if there be two joint-tenants for life, and one leases for years to begin after his death, this binds his companion, for if he make a lease for years immediately, it binds him. "So it is where he makes a lease to begin at a future day." A's lease would have been good if she had survived, but as she did not, it never took effect, and was void as to B's part, as A had no property to let or charge that, or to contract for it, and when first she contracted for a moiety it was her own part.

Cro Jam. 91,
92, Whitlock
v. Horton.

§ 6. *Baron and feme*, in her right, and A were joint-tenants for the lives of the *feme* and A ; the *baron and feme* by indenture let the moiety for twenty-one years, she died, A entered and drove out the lessee's cattle ; he brought trespass. Held, A was bound by this lease, which is as a lease made by her, until after the coverture, or one who claims in privity by her avoids it by entry ; for it is not void by the death of the *baron*, but only voidable, and the avoidance ought to be by entry which cannot be by A, as he is paramount the *feme* and not under her. In this case it was agreed, that "where one joint-tenant for life makes a lease for years and dies, it is good during the life of his companion."

Cro. Jam.
417, Smail-
man v. Agbo-
row.

§ 7. If A lease his wife's land and dies, his lease is not void ; but voidable only by her entry after his death.

Cro. Jam.
332.

Chattels real, if held in joint tenancy are liable to survivorship, and so is the trust of a term so held, (Bun. 342 ;) though joint tenancies are not favoured in equity. 1 Eq. Ca. Abr. 210, Petty v. Styward. A chattel interest may be created, but cannot be conveyed by bargain and sale, because the owner thereof has no *seizin* out of which a use can be raised ; but it seems *seizin* in law or equity will answer. In the case of *chattels real*, a general devise will pass all the estate of the

2 Cruise, 504,
505.—4
Cruise, 177,
178.—6
Cruise, 266.
—1 Cruise,
61.

CH. 133. *devisor, Fenton v. Foster.*—Lands devised to executors for and until debts paid, are a chattel interest. 6 Cruise, 436.

Art. 4.

1 Cruise,
249, 265.—2
Cruise, 49,
114, 116.

An estate for years, to commence *in futuro* may be assigned before entry, and it cannot be merged before entry; and the only mode of taking advantage of the breach of condition, is by entry or claim. A mortgagee of a lease is not subject to covenants till entry is made by him, though the mortgage has been forfeited. *Eaton v. Jaques.*

1 Leon. 136. § 8. So if A covenant with B, that he shall enjoy black-acre five years, paying rent; this is a good lease, and vests an interest in B. But a covenant that a stranger, shall enjoy black-acre seven years at such a rent, is no lease, but only a covenant.

1 D. & E. 735, § 9. In this case it was held, that a paper containing words Goodtitle v. of present contract with an agreement that the *lessee should take possession immediately*, and that *a lease should be executed in futuro*, operates only as an agreement for a lease and not as a lease itself. Whether certain words written make a *present lease* and give the legal interest, or are only an agreement to make a lease *in futuro*, depends wholly on the intentions of the parties. The general rule is, that if there be words in the agreement, "that A shall hold and enjoy, &c." and these words are not accompanied by restraining words, the words that express present possession or enjoyment operate as words of present demise; but otherwise, if they be followed by other words which show the parties intended, that there shall be a lease made in future; all depends on the intentions of the parties; but in some cases the words will be a present lease, and vest the interest in the lessee, and the future lease spoken of will be viewed merely as a further assurance.

2 W. Bl. 973, § 10. This was ejectment for lands; verdict for the plt. 975, *Baxter v. for the whole.* (So he must have sued *for the whole.*) A, lessor of the plt's. father, seized of an undivided moiety *for life*, remainder to the lessor of the plt. in tail, the other moiety being vested in B, and his heirs, a fine was levied &c. Nov. 28, 1760, A and B agreed as to their *respective moieties*, with the deft. "with all convenient speed to grant a lease to the said Brown, deft., and *they did thereby set and let* to him all that &c." to hold for 21 years from Candlemas then next, at the rent of £290 *per annum*, payable half yearly to the lessors, &c.; speaks of the contract as *this demise*—all three signed—deft. entered on this agreement and occupied 14 years. May 25 and 26, 1768, A being dead, B. conveyed his moiety to the lessor of the plt. in fee; March 29, 1773, lessor of the plt. notified the deft. to quit &c.; Oct. 2, 1773 and March 1, 1774, deft. paid him two half years' rent. The question was, if the plt. was entitled to recover B's moiety, &c. For the plt.

2 W. Bl. 973,
975, *Baxter v.*
Brown, A. D.
1775.—See 6
D. & E. 165.

it was said, the agreement, Nov. 28, 1760, was only an executory contract *to make a lease*, so nothing to prevent the lessor of the plt. to recover the moiety he bought of B. Cited, 3 Bac. Abr. Leases, 421; Noy, 128, *Sturgeon v. Painter*; and *Hasker v. Birkbeck*, 3 Burr. 1556.

CH. 133.

Art. 4.

For the deft. were cited *Harrington v. Wise*, Cro. El. 486; 1 Rol. Abr. 847; Moor, 459; Noy, 57, where held a covenant that A *doth let*, and that a lease shall be made accordingly, held to be a good lease *immediately*,—that what followed was only for *further assurance*; *Malden's case*, Cro El. 33; Hob. 34, *Tisdale v. Essex*. Court held this was a good lease *in presenti*, with an agreement, to execute a more formal and perfect lease *in futuro*. “The operative words, *let* and *set*, are in the present tense. A reference is made to *this demise*.—Fourteen years’ possession under this lease, and five or six of them since the lessor of the plt.’s title accrued. He has accepted rent” &c. Judgment for the plt. as to *one moiety*; for the deft. as to the *other moiety*. Four things are to be observed: 1. This was a lease *in presenti*, and the further lease mentioned, was only further assurance: 2. Was in writing, though not sealed, so not affected by the statute of frauds: 3. Made by tenant for life of a moiety, and by tenant in fee of the other undivided moiety; so at an end as to tenant for life by his death, and in force as to tenant in fee for his moiety: 4. Plt. declared for *the whole*—had judgment for *a moiety*. This was a lease by tenants in common and of their several interests, and expired as their estates ended respectively. Lease by estoppel, see Estoppel. Date, see Date, Ch. 27.

§ 11. As a lease for years passes but a *chattel interest* and needs not be attended by *livery of seizin*, it may commence *in futuro*, and be of a *reversion* or *remainder*, after an estate for years, for life, or in tail in possession. So a lease to A for twenty-one years, and the same day another lease of the reversion for twenty-one years is good; so “A, seized in fee, may make a lease to commence after his death.” And a lease for years may be assigned for part of the years. When a lease has no date, or an impossible one, the delivery is the date, and it thence commences; from the day of making, is the day after the delivery.

4 Com. B.
54.—Skin.
543.—Jon.
355.—Co.
Lit. 46.—6
Co. 35.—2
Burr. 1032.

§ 12. In this case it was held, that the acceptance of a new lease is an implied surrender of an old one, if the new lease be a good one; but if not a good one, to pass such an interest as the parties intend, then an acceptance of it will not imply a surrender of the former one, for it is not reasonable, nor can it be the intent of the parties, “that the acceptance of a bad lease should be an implied surrender of a *good one*,” and so it has been often decided.

4 Burr. 1975,
1980, Wilson
v. Sewell.

CH. 133.

Art. 4.

4 Burr. 2210,
2214, Davi-
son v. Stan-
ley.

§ 13. William Bromly, seized in fee 1686, leased for ninety-nine years, then he reduced his estate to one for his life, reserving a power &c. In 1693, made a new lease to the same tenant of the same premises for ninety-nine years (but not according to the power) but did not inform the tenant of this alteration in the lessor's estate; the tenant acquiesced and paid the rent for sixty years. Held, the acceptance of the second lease did not operate a surrender of the first. And it was resolved, "that the acceptance of a second good lease will operate a surrender of the former. But the reason does not hold in the case of accepting a new void lease, or one the lessee cannot enjoy." "The second lease was a deceit upon him," the tenant;" for the lessor had no title to grant this new lease." "A void contract for a thing that a man cannot enjoy, cannot in common sense and reason imply an agreement to give up a former contract."

Dougl. 50,
53, Doe v.
Butcher.—
4 Cruise, 133.

§ 14. If a lease be void against a remainder-man it cannot be set up by his acceptance of rent, and his suffering the tenant to make improvements after his interest vests in possession. And Lord Mansfield said, there could be no confirmation of a thing absolutely void. This is a principle settled in many cases. But the question, what is absolutely void and what is voidable only, depends on so many circumstances and considerations as to be incapable of any precision or of much certainty. It is said in the English courts, that the leases of married women are only voidable, but that their mortgages are absolutely void; and yet in such a case of a mortgage the court said, that the acts done by the widow after her husband's death, the deed being in the mortgagee's possession, "were tantamount to a redelivery, which without a re-execution is equivalent to a new grant." But if the old deed was absolutely void how could there be a new grant of lands or interests in lands, without any kind of writing? Now if the deed was absolutely void as to her, there was no deed as respected her; how then could her acts in *pais* not in writing amount to a deed, as they must have done to have been of any validity? Clearly they could not, except the mortgage was only voidable, and she waived or declined to exercise her right or power to avoid it, which undoubtedly she may do when free to act, and when she does so, her old deed stands good and unavoided; but when really void there is no deed at all.

§ 15. *Notice to quit &c.* To tenant for years &c., see Ch. 151, a. 9, many cases, Debt for rent; and Ch. 178, a. 33, Notice to quit.

The rule is, if the duration of the lease is not prescribed by 1 D. & E. 159, Right v. Darby & al.—2 W. Bl. 1224.—2 East, 382.—13 H. VIII. 15.—7 East, 551.—4 D. & E. 361.—6 D. & E. 219.—1 H. Bl. 311.—3 Wils. 25, Parker v. Constable.—2 East, 237.

the terms of it, but is at the will of the parties, regular notice must be given to determine the lease. This depends on the nature of the letting; if originally for a month, or week, a month's or week's notice will do; if from year to year, the notice must be of half a year at least, and determinable with the year. This notice required for convenience extends to houses as well as to lands; and it may be waived by the party giving it, or dispensed with by consent of both parties. But no collateral consideration, such as reserving the rent quarterly, is a dispensation of it. What is a waiver is a question of fact. The receipt of rent due after the expiration of the notice, *eo nomine*, as rent, or a distress for it, is such waiver—receiving rent accruing after.

Must be a half a year's notice to tenant at will to quit; so to an executor of a tenant at will: and no ejectment lies till the half year is expired.

The rule was originally, reasonable notice to quit, where notice was necessary; and this as early as the reign of Hen. VIII. was deemed to be half a year's notice. And such notice refers to the substantial day of entry of the tenant; what is the substantial day &c. must depend on the facts and circumstances of each case.

A agreed to lease to B at a certain rent, and A not to turn B out as long as he paid the rent, and did not sell &c. any article injurious to A's business. Held, either a lease for life, and then void, because by parol, or if a tenancy from year to year, it must be necessarily determinable by either party giving regular notice to quit. And Lord Ellenborough C. J. held it repugnant to the nature of a tenancy from year to year, that the option of determining be with the tenant alone. Many cases in New York as to such notice. 1 Johns. Ca. 33; 2 Cain. 174, Jackson v. Bradt, Ch. 178; Jackson v. Bryan, Jackson v. Chase; 2 Johns. R. 444, Jackson v. Tyler; 3 Johns. R. 422, Jackson v. Deyo, Ch. 178. Notice is not necessary where the tenant denies the landlord's right. The tenant disclaims his relation to the landlord, and this is an instant determination of the tenancy on the tenant's part. Doe v. Weller. Where the *proviso* in the lease is that the notice be in writing, parol notice will not do. Willes, 43, Legg v. Benion; 2 D. & E. 430. But written notice is not necessary, except on the statute for double rent: and see Wright v. Cuthell. Persons occupying lands of the owner, on agreement to give him a certain share of the crops, are tenants, and entitled to require notice to quit. And there may be a tenancy and no certain rent agreed, but on a *quantum meruit*.

The landlord need give notice but to his own tenant, and not to his under-tenants; and if possession be not delivered

CH. 133.

Art. 4.



6 East, 120,
126, Doe v.
Sjence.—2
Esp. R. 589,
635.—4
Maule & Sel.
265.

8 D. & E.
164, 168, Doe
v. Browne.
See Jackson
v. Rogers.—
2 Cain. Cas.
in Error, 314.
—1 Bin. 334,
Browne v.
Vanhorn.—
1 Johns. R.
322.—Peake's
N P. 196.—
7 D. & E.
478.—3 D. &
E. 582.—7 D.
& E. 63, Doe
v. Knightly.—
1 Johns. R.
267, Jackson
v. Brownell.
—4 East, 29.

5 Bos. & P.
330, Roe v.
Wiggs.—8
R. 153, 196.

East, 228.—7 East, 551.—5 Esp.

- CH. 134. up after such notice, the landlord may have a verdict in ejectment against his own tenant for the parts detained by his under-tenants (though he has given up the part he possessed) and have execution, and thereon the officer may turn out the under-tenants, and the tenant pays costs; and otherwise the landlord might have a pauper put into possession. 4 D. & E. 464. Two tenants under a joint demise, notice to one on the premises is evidence the notice reached the other who lived elsewhere.

CHAPTER CXXXIV.

ESTATES IN COMMON, COPARCENARY, AND JOINT-TENANCY.

ART. 1. *General principles.* See Ch. 42.

Ch. 42.
Joint inter-
ests as to
contracts.

§ 1. Where joint interests &c. have been considered in regard to certain actions. See *Partners and Part Owners*, Ch. 52. See *Account*, action of, among tenants in common, &c. Ch. 8; see *Ouster*, and many other parts of this work where these joint interests occasionally come into view: also, *American Precedents* and *Story's Pleadings*, where tenants in common, parceners, and joint-tenants join in actions and pleas or not. See *Joint and Several Covenants, Warranties, &c.*

4 Wood's
Con. 441.

§ 2. Tenants in common have several estates or interests, several titles, and may hold from different periods of time; they have a unity in nothing but possession. Hence, one tenant in common may enfeoff another and make livery of seizin of an undivided moiety or other undivided part. Otherwise as to joint-tenants, who have a unity of title, as all under one purchase; unity of interest, as all in fee or in tail, for life or years; unity of time, as all hold from the same point of time; and unity of possession, as all possess jointly. One cannot enfeoff another, but one releases to another. There may be tenants in common with survivorship. 1 Maule & Sel. 428.

2 Bl. Com.
187, 188.

§ 3. Parceners are where lands of inheritance descend from the ancestor to two or more persons, as his daughters, sisters, aunts, cousins, or their representatives, or the males in *gavel-kind*, they all make but one heir to their ancestor, and have but one estate among them; they have a unity of title, of interest, and possession, but not of time. Parceners always

by descent, and the parcenary continues as long as the whole descends. And hence, as there is among them unity of time, if one of them dies leaving heirs, they and the survivor or survivors are still parceners; they have a *unity* not an *entirety* of interest; each is properly entitled to the whole of a distinct moiety or part, and there is no survivorship among them. At common law they may sue or be sued jointly as to their lands. Though by this act any one or more of them may sue for waste or in ejectment &c. where possession is the object. And where the land or estate cannot be well divided, it may be assigned to one and he or she make the others a reasonable allowance; they may divide by agreement, or cause partition to be made by suit or by petition on our statute, as may also joint-tenants and tenants in common. They may usually of any one of these is the entry of all; nor can they have trespass or waste against each other, except as Ch. 2, a. 8.

CH. 134.
Art. 1.

Mass. Act,
March 9,
1786.—Mass.
Act, March
9, 1784.—
Maine Act,
ch. 35.—
Mass. Act,
March 9,
1786.—2 Bl.
Com. 188.

§ 4. If parceners or joint-tenants make partition of their joint interests or titles they become tenants in common. As one alien, the purchaser and the others are tenants in common, and if they make division they all are then tenants in severalty. Parceners, as tenants in common, may enfeoff each other.

2 Bl. Com.
189.

§ 5. Coparceners and joint-tenants join in avowry, but tenants in common must sever. So as to all real or mixed actions tenants in common cannot make a joint lease, but the others may; for the estates and titles of these are joint, but not of those several. As any of these may sell and convey his part, so any of them may make a lease of his part for years of the land, or of the herbage, *in presenti* or *in futuro*; and if the one so leasing die, his lease cannot be avoided by the survivors, for the lessee has a vested interest under the lease. So the parcener or tenant in common may devise his or her part, but not so the joint-tenant.

Salk. 391.—
2 Wils. 232.
—Co. Lit.
200.—Co.
Lit. 186.

§ 6. At common law if one joint tenant sold the wood and kept the money the other had no remedy, but by the 4 & 5 of Anne ch. 16, joint-tenants and tenants in common may have an action of account against each other. See Accounts, Ch. 8.

Doct. & Stud.
64.

§ 7. A tenancy in common may in any case be created by the destruction of a joint-tenancy or coparcenary, leaving the unity of possession, or by express limitation in a deed.

2 Bl. Com.
192.

§ 8. In any of these tenancies the jury may presume one tenant has *ousted* another. See Presumption and Evidence of Ouster.

§ 9. Joint-tenants and tenants in common were not compellable at common law to make partition; but are by statutes of 31 H. VIII. c. 1, and Wm. III. So by Mass. Act, March

CH. 134. 9, 1786, and by said act are specially liable to waste, and by
 Art. 2. W. II. c. 22. But 31 H. VIII. c. 1, extended only to estates
 of inheritances, and by writs of partition. But by 32 H. VIII. c.
 32, joint-tenants and tenants in common, where one or all have
 but an estate for life or years, are compellable to make parti-
 tion. But we have no occasion to practice on these statutes
 for reasons stated post, Partition &c. Devise to two equally
 between them is a tenancy in common.

Dean v. Gas-
 kin, Cowp.
 657.

Abr. Eq. 3,
 Stringer v.
 Phillips.

§ 10. In wills the courts will construe survivorship into
 some other meaning than a joint-tenancy if possible; hence,
 will refer the word to the testator's death or other particular
 time &c. 1 Ves. 14; 3 Burr. 1881, *Rose v. Hills*; 3 Ves.
 jun. 450; 4 Ves. jun. 551, *Russell v. Long*; Bos. & P. 1;
 New R. 82, *Garland v. Thomas*; 2 P. W. 260.

ART. 2. *Tenants in common.*

4 Com. D. 71.
 —6 Cruise,
 408, 414.—
 2 Bl. Com.
 193.—9 East,
 276.—3 Co.
 39.—2 Bl.
 Com. 194.—
 3 Salk. 205.
 —2 Ves. 257.

§ 1. Words that make tenancies in common and principles
 peculiar to them. Words that make tenancies in common, as
 lands given, granted, or devised, *one moiety to one, and one
 moiety to the other*. If A grant half his land to B, A and B
 are tenants in common, for joint tenants do not take by dis-
 tinct halves. Devise to A and B, equally to be divided between
 them. So to A and B to hold as tenants in common, and
 not as joint tenants. So goods or terms for years devised to
 two equally. And so to two equally and their heirs. So a
 devise to two, part and part alike. To two equally. Cowp.
 660, or alike, 357, 657.

1 Wils. 341.
 —Salk. 391,
 392.

"Equally to be divided among them," in a *deed of uses*,
 makes a tenancy in common; and so in a *will*, but not in a
deed of land.

3 Atk. 371
 —Bl. Com.
 180, 181—
 Co. Lit. 188.
 —Ves. jun.
 629.—5 Ves.
 jun. 208.—
 2 Atk. 304—
 Co. Lit. 189,
 190.—4 Com.
 D. 66.—
 Torret v.
 Frampton,
 Style, 434.

§ 2. If a remainder be limited to the heirs of A and B, and
 during the particular estate A dies, which vests the remainder
 of a moiety in his heirs, and then B dies, whereupon the
 other moiety vests in his heirs, the heirs of A and B are
 tenants in common, for their estates begin at different times.
 So if lands be given, to hold one moiety to A and his heirs,
 and the other moiety to B and his heirs, they are tenants in
 common. So if joint tenants make several grants in tail, or
 for life, the grantees are tenants in common. So if lands be
 granted "to a *layman* and a *parson*, and the heirs, of one and
 successors of the other; for the fee vests in them in *several*
capacities." So if one seized in fee, convey an undivided
 part to another. So if seized for life, the grantee and other
 lessee are tenants in common as long as both lessees live, and
 the lessor shall enter into a moiety by the death of either of
 them, because by such grant the jointure is severed.

Co. Lit. 349.

§ 3. If tenant in tail to him and the heirs of the body of his
 wife has issue, a daughter, and afterwards another daughter

another wife, discontinues the estate, and then disseizes CH. 134.
 a discontinuee and dies, his daughters are tenants in com- Art. 2.
 on by descent; for the eldest is remitted to a moiety; hence
 they are not parceners, for they claim by several titles.

§ 4. If any have lands by *several* titles, they are tenants in 4 Com. D.
 common; as if lands be granted to two corporations and their 66.
 successors; so to two parsons and their successors, for each
 seized in the right of his several church. And if a bond be
 given to A and a corporation, and A dies, it does not sur-
 vive.

§ 5. If land be given to two men and the heirs of their Lit. s. 283,
 bodies, the inheritances in tail are in common; for of necessity 284.
 they must have different heirs. Where *paying equally*, makes
 a tenancy in common. 2 Cain. Er. 326.

§ 6. So if lands be granted for life, remainder to the right Co. Lit. 188.
 heirs of A and B, their heirs are tenants in common; for —Cro. El. 220.
 their titles and estates commence at different times, and they
 are not *parceners*, as they take by *purchase*. The law does
 not presume A and B will die at the same time.

§ 7. So if lands granted by *joint* words be severed in the Lit. s. 298.
habendum, as a grant to A and B, to hold a moiety to one and —Co. Lit. 183.
 his heirs, and the other moiety to the other and his heirs, they
 are tenants in common.

§ 8. The same of a lease for life or years to two. So if a Co. Lit. 188.
 man covenant to stand seized to A and B, *equally to be di-* —4 Com. D. 66.—2 Vent. 365, 266.
vided, they are tenants in common of the inheritance, as well
 as the estate for life. So by reason of the word *respectively*,
2 Atk. 121; or amongst, 3 Ves. jun. 629.

§ 9. So if A, seized in fee, conveys lands to trustees to 1 Wils. 341,
uses, to the use of his children and their heirs, *equally to be* 342, Good-
divided among them, it is a tenancy in common in this deed as title v. Stokes.
 well as in a will. This conveyance was by lease and release.
P. 342, it is said, there is no solemn decision "that these words
will not make a tenancy in common, even in a deed."

§ 10. If a parcener or joint-tenant conveys his part in fee, Lit. s. 292,
 in tail, or for life, to A, he and the other parcener or joint- 294, 295, 300,
 tenant are tenants in common; for they claim by several titles. 301, 309.
 So if both parceners or joint-tenants convey &c., the grantees
 are tenants in common. So if there be several joint-tenants, Lit. s. 304.—
 and one of them releases his part to one of his companions; 4 Com. D. 67.
 he is tenant in common for that part, with his other com-
 panions. A devise to two nephews, *and the survivor of them*,
 and their heirs, *equally to be divided between them*, share and
 share alike. Held, the nephews were joint-tenants for life,
 and their heirs tenants in common, to give effect to all the
 words of the will. *Barker v. Giles*, 2 P. W. 280.

§ 11. So if lands be granted to A and B, to hold to A *for* Co. Lit. 188.

CH. 134. *life*, and to B *for years*, they are tenants in common ; for an
 Art. 2. estate of *freehold* or *inheritance*, cannot stand in jointure with
 a term *for years*. And so a *right of action* or *entry* cannot
 stand in jointure with a *freehold* or *inheritance* in possession.
 Hence if *baron* and *feme* and A be joint-tenants, and the baron
 aliens, and dies, the wife and A are tenants in common, and
 not joint-tenants.

§ 12. Though the above are the most common and material expressions and forms used in creating tenancies in common, and sufficiently tend to explain the principles on which they are founded, yet they are by no means all the words and ways used, or to be used to this purpose, as will readily be recollected. And as the law allows men, in conveying or devising estates to two or more persons, to use generally their own words, it is easy to perceive, that different men, in different times and circumstances, will use words or expressions varying almost infinitely. So that certainty in all cases in creating these kinds of estates is not to be expected. However, as every estate to two or more persons must be in *parcenery*, which is always by *descent* only, or *joint tenancy*, always by *purchase* alone, or in *common*, by *descent*, *purchase*, or *prescription*, and whenever by *descent*, the law alone governs, —this variety and uncertainty in expressions is confined to *purchases* ; and as in these, words of doubtful meaning must convey either a *tenancy in common*, or a *joint-tenancy*, it follows, that whatever words be used in a devise, conveyance, or lease, we have only to inquire which estate, in common or joint-tenancy, they create or convey. And in this inquiry, we shall always find the estate is a tenancy in common, if the devise, conveyance, or lease, creates *several and distinct titles*, and *unity only in possession*. Indeed always this tenancy in common, if the deed or will does not operate to create among all the owners of the estate, 1. A unity of *title*, that is, one and the same title : 2. A unity of *interest*, as all in fee, all in tail, &c. : 3. Unity of *time*, as all holding from the same point of time, (some cases of shifting uses excepted) : 4. Unity of possession, all possessing *per my et per tout*. For if the estate created, conveyed, devised, or leased, or altered, wants any one or more of these essential requisites to a *joint-tenancy*, it cannot be one. But in a tenancy in common, unity of *title* is not essential, for one may hold by *descent*, and another by devise, or grant, or lease. Nor is unity of interest, for one may hold in fee, another in tail or for life, &c. Nor is unity of time, for one's estate may have vested fifty years ago, and another's only a year since. Only unity of possession is essential to a tenancy in common. It follows, that tenants in common cannot make a *joint lease*, because they have several titles and

2 Bl. Com.
191, 192.

2 Wils. 232.

interests ; and for the same reason one may enfeoff another. **CH. 134.**
 Three nieces *tenants in common*, though to the survivors &c. **Art. 3.**
 New R. 82.

§ 13. An alien and a subject may purchase lands jointly. **Co. Lit. 188,**
By disseizin. If A and B *disseize* one of lands to their own **189.—Co.**
 use, they are joint-tenants ; but if only to the use of A, he is **Lit. 180, 181.**
 sole tenant, and B coadjutor. If to the use of one absent,
 who does not know of it, they are joint-tenants, before he
 agrees ; but after he agrees they cease to be tenants, and are
 only coadjutors ; and the other, by agreeing to such disseizin
 to his use, becomes tenant, and is as much a disseizor, as if
 he had commanded it, for a subsequent assent is equivalent to
 a precedent command. But if I disseize A to B's use, I gain
 no estate in the land. If lessee for life be disseized to the
 use of the lessor, and then he agrees, yet he is a disseizor in
 fee, for by the disseizin the fee is divested. But an "entry
 alone is not a disseizin, without a claim, or taking the pro-
 fits."

§ 14. Land is devised to A and B and their heirs, and the **Salk. 226,**
 longest liver of them, equally to be divided between them and **Blissell v.**
 their heirs. This is a tenancy in common. No construction **Cranwell &**
 against express words ;—but 1 Wils. 165. **al.**

ART. 3. *Joint-tenants.*

§ 1. Words at common law that make a *joint-tenancy*. **4 Com. D.**
 This kind of estate is never by *descent*, but only by *purchase*, **64, 66, 66.—**
 so by will or deed ; and either must create an estate joint in **6 Cruise, 404,**
 all respects, as stated in the second art. They are seized **408.**
per my et per tout, and if one dies before severance by deed
 or lease, his part goes to the survivors or survivor, his devise
 has no effect. And if one grant a rent out of his part, or a
 way over the land, and dies, the survivor holds the land dis-
 charged, for he claims and holds under the original con-
 veyance that creates the joint estate, and not under the one
 deceased. The same rule holds, if he acknowledge a recog-
 nizance, and die before execution extended. But a joint-
 tenant may sever his part, even by a lease for years, if not on
 a condition precedent, happening after his death. And if the
 lease be good, the rent reserved accrues to the lessor's ex-
 ecutors. One joint-tenant cannot enfeoff another, but may
 release to him, and then the releasee claims under the re-
 lease.

§ 2. In this case it was held, that if a joint-tenant make his **1 W. Bl. 476,**
 will of lands, and then before his death the land is severed, **Swift v. Ro-**
 still the will was void, for the severance could not relate **berts.**
 back to the time of making the will. This case shews, as do
 many others, that a man cannot devise land unless he has it
 so as to be able to devise at the time he makes his will.

- CH. 134. § 3. Two women, joint lessees for years, one takes a husband, and dies, the other shall have the term by *survivorship*, and not the husband, for hers is the elder title. Co. Lit. 187.
 Art. 3.
- Co. Lit. 185, 186. § 4. Each joint-tenant is seized by every parcel and in every parcel, and in the whole, jointly with his companion; but each of them has a right to but a moiety &c. as to enfeoff, or demise, or forfeit such part. And if one sells the whole, his deed operates only on his part. Yet joint-tenants hold by one title and one right, but tenants in common by several titles and several rights; hence they sever in actions touching *titles and rights*, and join in those touching *possession*, whereas joint-tenants join in all.
- 1 Wils. 212. § 5. A grant of twenty acres to two men, to wit, ten acres to one, and ten acres to the other; the *to wit* is void, and they are joint-tenants.
 —3 Salk. 207.
- 2 Bl. Com. 182. § 6. A joint-tenancy arises solely from the acts of the parties, and depends wholly on the wording of the deed or devise, and is when lands are granted to two or more in fee, in tail, for life, or years, or at will.
- Hob. 172. § 7. Rent reserved to one joint-tenant, a surrender to one, livery of seizin to one, or an entry by one, enures to both or all. And one joint-tenant cannot have trespass against another at common law, for each has an equal right to enter on the land, or any part of it. But one has waste against another, by 2 W. ch. 22, for waste to the inheritance.—And see Account, and Ch. 42. A devise to two equally, is a tenancy in common, but if added and to the survivor, this explains and makes a joint-tenancy.
- 2 Bl. Com. 182.
- 2 Bl. Com. 183. § 8. If there be a devise to 3 men, and it is added that the survivor of them shall be each other's heirs, all are joint-tenants.
- 2 Bl. Com. 183.
- 1 Cro. 161. § 9. Joint-tenants in *a use or trust*. As if a conveyance be to A in fee, to the use of A and B and their heirs, they are joint-tenants of the use, though the possession is only in A; and as the statute of uses executes the possession, as they have the use they are joint-tenants of the estate, which, by the statute, attaches itself to the use.
- Gilb. Law of Uses, 70.
- Co. Lit. 188. § 10. So a conveyance to one to the use of A and such wife as he shall marry; he marries, he and his wife are joint-tenants of the use, though their estates therein begin at different times. The husband at first has the use alone, on the marriage a moiety shifts to the wife *in equity*, and the statute vests the estate in them as they have the use; one exception as to time.
- Gilb. Law of Uses, 71.—
 2 Bl. Com. 181.
- 1 Co. Lit. 188. § 11. So if one make a disseizin to *the use* of A and B, and A consent at one time, and B at another, yet they are joint-tenants.

2. So a conveyance to A to the use of A and B, they are tenants, though B gave no consideration, because the land is disposed of, *expressly*, to him as well as to A. And if a joint-tenant dies, his interest survives to the other; but if a state or purparty of a parcener or tenant in common descends to his issue or heirs; and if land be let to A and B for life, B's interest shall survive, but A's not, for on A's death there is an end of the estate, but not so on B's death. "A joint authority cannot survive, but a trust coupled with an interest shall survive together with it." If one agree to convey part, his contract is a lien on it in equity.

CH. 134.
Art. 3.

Gilb. Law of
Uses, 71.—
Co. Lit. 187.
—New. on
Con. 35.—2
Vern, 63.

13. If land be given to two men, or to two women, or to a man and his mother, and the heirs of *their bodies*, the donees have a joint estate for life, but *several* inheritances—for they may not marry, nor have one heir; and to allow survivorship would defeat the will of the donor as to the lessee of him who would die first. "But where land is given to two men and *their heirs*, the survivor shall have the whole." And if a lease be for life, remainder in tail, remainder in fee to two, they are joint-tenants for life, tenants in common of the estate tail, and joint-tenants of the fee; and if a lease be made to two and to the heirs of one of them, they are joint-tenants for life, and one has a freehold and the other a fee. And the freehold in these cases drowns not in the fee, because made by the same conveyance, and by the express intent of the deed; a joint estate is given to the parties for their lives, but the inheritance is divided from the life estate to this purpose only, for the party cannot convey it away after his decease, and retain his joint estate for life.

Co. Lit. 186,
187, 188.—
Co. Lit. 181,
182.

§ 14. Where the inheritance and particular estate are divided, in *several* conveyances, the one drowns the other. Therefore, if lessor for life grant the reversion to two joint lessees, and the heirs of their two bodies, they become tenants in tail, in possession. And if such lessor grant his reversion in fee to one of his lessees; or if one makes a lease for life and grants the reversion in fee to his *lessee and a stranger*; or if lessee for life grant his estate to his *lessor and a stranger*, or to one of his lessors joint grantees of the reversion in fee; in all these cases the fee is executed for a moiety in him in whom the fee and estate for life meet together; and as to the other moiety, there is an estate for life in the one, and the reversion of the fee in the other, and no joint estate remains.

Co. Lit. 182.

A devise to Jane, the wife of B, and to Elizabeth, wife of C, to be equally divided between them during their lives, and after their decease (of both of them,) to the right heirs of Jane forever, is a joint-tenancy on the evident intent. Hok's

CH. 134. R. 370, cited, 6 Cruise, 405, 406, Tuckerman v. Jeffries ;
Art. 3. but. Cro. J. 448.

Co. Lit. 186. § 15. If a joint-tenant grant a rent, and then release to his companion, the grant remains good, because the releasee claims not by survivor, though in from the first feoffor to most purposes. And if there be three joint-tenants, and one of them grants a rent charge, and then releases to one of his companions only, the rent clearly remains good, for the releasee claims not from the feoffor, but only from the releasor ; for he has no better right to claim from the feoffor than the other has, the part of the one releasing.

Co. Lit. 186. § 16. One joint-tenant may make the other bailiff, or lessee for years, or at will of his moiety.

Co. Lit. 188. § 17. There may be joint-tenants of a right ; as if joint-tenants are disseized, they remain joint-tenants of the right ; and so there may be of a chattel, or *chose in action*. If two women marry, and their husbands alien in fee and die, the women are joint-tenants of the right ; and joint-tenants of a right shall be joint-tenants again if they recover, though by several actions and in different forms of actions, as they recover on their original titles.

4 Com. D. 67.—Bunb. c. 342, Rex v. Williams.—2 Cruise, 506. § 18. If a joint estate be assigned in trust, and one of the *cestui que trusts* dies, the trust survives for the benefit of the surviving *cestui que trust*, against the creditors of the deceased, in equity as well as law. Joint-tenancy is not favoured in equity.

4 Com. D. 68.—Lit. s. 302.—Co. Lit. 193. § 19. If two are joint-tenants in fee, and one conveys only for life, his part does not survive ; for the freehold being severed, the reversion upon it is also severed. So if only for his own life who conveys.

4 Com. D. 68.—Co. Lit. 337. § 20. So if a wife, joint-tenant, takes husband, who makes a feoffment, the jointure is severed during the continuance of the discontinuance ; for a right of action cannot stand in jointure with a freehold or inheritance in possession. So if a *minor* joint-tenant makes a feoffment, the jointure is severed, though the feoffment be voidable, as it is valid till avoided.

Co. Lit. 182, Bateman v. Allen.—Cro. El. 433.—Cro. El. 470, 481, 743, Childs v. Wescot.—2 Ch. on Pl. 215. § 21. So if a lease be to two for their lives, and by another conveyance the lessor grants the reversion to them and the heirs of their bodies, the jointure is severed and their is no survivorship, for the estate is executed, and they are tenants in common, in tail in possession. In tail, for their life estates are merged, and so in possession in tail ; and in common, for they cannot have one heir of their bodies. And cases above. So if the reversion be granted to one of the lessees in fee or in tail ; for the reversion is executed for a moiety, and the life prior estate merged for that moiety. So if the reversion be granted to a lessee and stranger and their heirs. So if the rever-

sion descends to a joint-tenant, and one of them buys the reversion, his life estate drowns and severs. (How to plead a demise by *baron* and *feme*.) CH. 134.
Art. 3.

§ 22. So if joint lessees of a term, and one assigns part of his term to the other, it is a severance of the whole. So if one of them mortgages his part. Cro. El. 33.—
1 Salk. 156.

§ 23. And if there be joint lessees for life, and one leases for years, it shall be a good severance during the term. So if to commence at a future day or after his death. So if he leases for years, if he or his companion live so long. And so is the effect of husband's and wife's lease of her land in England, there voidable, but not avoided; for the severance continues till avoided. But if a joint-tenant lease for years, this does not sever the jointure as to the freehold, but only for years. 2 Cro. 417.—
2 Cro. 91.—
4 Com. D. 69.
Co. Lit. 185.

§ 24. But if a *feme* joint-tenant marries, this is not a severance of the jointure; otherwise if a personal thing, for then her interest vests in her husband and the jointure is severed as a new title accrues in him. 4 Com. 418.

§ 25. Yet if a lessee for years makes a lease for a less term, that severs the jointure, and the term does not survive. Co. Lit. 192.

§ 26. Though joint-tenants are seized *per my et per tout*, yet each is entitled to but his part. Hence, if a feoffment be on condition that on breach thereof one shall enter into the whole, yet he shall enter only into his part. And two joint-tenants grantors, each conveys only his part, and so must their grant be pleaded. A subject and alien joint-tenants, the king has only the alien's part, and this on office found. Co. Lit. 186.

§ 27. If one joint-tenant contract to make a lease for years, this does not bind the survivor, for no interest passes by such contract; nor if he lease on a condition precedent not performed, for till that be performed no interest or estate passes. So if a joint-tenant grants the part of his companion, it is void, though he survives, for it was in contingency. 4 Com. D. 70.
—3 Ves. jr. 257.—3 Bac. Abr. 206, 207.

§ 28. *Joint-tenancy destroyed.* This is by destroying any one of the constituent parts before stated, and by any of the means before stated, and by many others. An estate expressly devised as a tenancy in common among four children "with benefit of survivorship, is a joint-tenancy." 1 Wils. 166,
167, Hawes
v. Hawes.

§ 29. Devise to A for life, and after her decease to B and her children of her body begotten and to be begotten by G, her husband, and their heirs forever, one child being born at the time. Held, this made a joint-tenancy between B and her children. And it is no objection that the estates may commence at different times. 2 Stra. 1172,
Oates v. Jackson.—2
Cruise, 354.

§ 30. A devise by a joint-tenant is not good, though he afterwards does an act to sever the jointure; he has no power 1 W. Bl. 476.

CH. 134. to devise when he makes his will. In *Oates v. Jackson* the
 Art. 4. joint estate opened, yet all one title.

12 Mass. R.
 474, Varnum
v. Fox & al
 —12 Mass. R.
 348.—13
 Mass. R. 57.

§ 31. *Writ of entry.* And held, though a conveyance by one joint-tenant or tenant in common of a part of the land by metes and bounds to a stranger, by deed, or by the levy of an execution, can have no legal effect to the prejudice of a cotenant, yet it operates as an *estoppel* as against the grantor and those claiming under him. It may be much doubted if such levy is such *estoppel*, as the levy is adverse to the debtor, as often decided. And how can his not redeeming change the nature of the levy, a matter of record,—and he may not redeem by reason of the fraud. And the creditor who takes his debtor's land adversely ought to look to his title, and not do what is so clearly contrary to that title.

ART. 4. *Parceners.*

2 Bl. Com.
 187 to 190.—
 Lit. s. 241.

§ 1. Parceners are always by descent, and descent only, and all make but one heir to their ancestor; and so long as the lands continue to descend they remain parceners. They have all the unities joint-tenants have, except that of time; they may sue or be sued jointly as to their lands; there is no survivorship among them. If one alien, the buyer and the others become tenants in common, they may divide by their deeds, by suit, or by petition. And where the thing cannot be divided, it may be assigned to one, and he or she make the other a reasonable allowance, or they may in some cases have it by turns.

Salk. 390,
Stedman v.
Bates—4
 Bac. 323.—
 2 Cruise, 537,
 541.

§ 2. Parceners must join in avowry. And if A devise lands to his eldest daughter, and direct that she pay the youngest £30 a year, this is a condition, and descends on the two daughters (heirs at law), and for breach thereof the youngest may enter into a moiety, though the condition descends on both.

6 Com. D.
 164, 166.—
 Co. Lit 163.
 —2 Cruise,
 541.

§ 3. Parceners have a joint-interest, as all are in fee or in tail &c., but they have several interests, as there is no survivorship; “each parcener has a moiety or several interest in the land descended to her—liable to dower and curtesy. 1 Cruise, 120.

Co. Lit. 164.
 —2 Cruise,
 539, 541, 546.

§ 4. If one parcener die, the son or other heir of the deceased shall be parcener with the survivor so long as the estate descends.

1 Cruise, 120.
 —2 Cruise,
 541.—Lit.
 s. 264—Co.
 Lit. 167.—Co.
 Lit. 169.

§ 5. If one after issue born, dies, by which her husband is tenant by the curtesy, the other shall be parcener with him, and shall have a writ of partition against him, though the husband is not a parcener. If one parcener disseize the other, after recovery they are parceners again, as they are in of their former titles. If one parcener grants rent to another for equality of partition it follows the nature of their estate.

6. All lands and tenements of which partition may be made, descend in parcenary, as a rent charge, though it be entire; and though entire inheritances that cannot be divided, as *alleu*, for one may have his services for one day or one month &c., and afterwards the other for another day or month. So of a mill, for one shall have it for so long a time or one dish, the other for a like time afterwards, or the second dish. In what they resemble joint-tenants or not. 2 Co. Lit. 165. *Cr. 134. Art. 4.*

§ 7. Where the entry &c. of one is the *ouster* of the other, is an *Ouster* in a former chapter. In this respect the same principle applies to parceners, tenants in common, and joint-tenants. As to implied warranties in partition, see Warranties.

§ 8. Where partition is made by the proper officer the eldest parcener has no choice. So are our partitions by commissioners. No partition now can be but by deed, or dividers appointed by some court properly authorized to make partition. *Lit. sect. 249. —2 Willes, 248, Johnson v. Wilson.*

§ 9. By the common law one or more parceners might have a writ of partition against the others; and if one aliened his part in fee the other might have partition against the alienee. So an alienee in fee, or husband in the right of his wife, a parcener, had partition against a parcener. And if a parcener lease for years, partition lies; for the freehold continues in parcenary, and partition lay only against the tenant of the freehold. *Lit. sect. 247. —Co. Lit. 167, 175.—2 Cruise, 542, 544, 547.—4 Cruise, 142.*

§ 10. In partition among parceners at common law there were two judgments: 1. That partition be made among the parties aforesaid, and a writ issued to the sheriff to go in person to the tenements, and by the oath of twelve lawful men of the neighbourhood, in the presence of the parties, to make partition between them &c. making no mention of the eldest any more than of the youngest; and when partition so made was returned under the seals of the officer and jurors, the second judgment was, that the partition aforesaid be confirmed and established forever; and error lay only on this final judgment. Before the statute of frauds partition among parceners might be made by parol. *Co. Lit. 168. Co. Lit. 169.*

§ 11. Tenants in common and joint-tenants could never make partition by parol, but by deed they might; and tenants in common might have executed a parol partition by livery of seizin.

§ 12. And partition made by the king's writ between parceners of full age, or infants, or *femes covert*, whether equal or unequal could never be avoided. And it was formerly held, that partition made by one of *non-sane* memory bound herself, but not her issue unless equal: and also, that an equal *Co. Lit. 171. —Co. Lit. 166.*

CH. 134. partition made by minors could never be avoided; but if
 Art. 5. unequal, then it might be avoided either during nonage or after
 full age, but if she took the whole profits of the unequal part
 after her full age, she was forever bound. And full age of male
 and female was twenty-one years, and before that age one
 could not bind himself by deed, nor alien land nor goods, or
 be bailiff or receiver, or charged in account as such. See Ac-
 count.

1 Inst. 164,
 243.—Hob.
 120.—Ch. 92,
 a. 1, s. 6.

§ 13. Parceners always claim by descent. 2 Cruise, 538.
 No unity of time necessary and they have several freeholds.
 Id. The entry or possession of one is that of all. Id.; and
 539; 3 Cruise, 555. One can be disseized but by *ouster*,
 and is not expelled by another's taking all the profits. 2
 Cruise, 539, 540. May lease jointly or severally, 4 Cruise,
 118; and release to each other without the word, *heirs*. 441.
 See Ch. 125, a. 5, s. 12, 33, &c.; Ch. 126, a. 1; Ch. 42,
 a. 3; Ch. 171, a. 12, s. 9.

ART. 5. *Husband and wife.*

§ 1. When an estate is given or conveyed to them jointly they
 are not properly joint-tenants, but take as one person and an
 entirety. Hence, if an estate be made to husband and wife,
 and a third person, and their heirs, he takes one moiety and
 husband and wife another; "for they are but one person in
 law," "therefore, there are no moieties in law of a joint
 estate made to them both during the coverture."

Co. Lit. 189.

Co. Lit. 187.

§ 2. But if a lease be made to B and to husband and wife,
 viz. to B for life, to husband in tail, and to wife for years, in
 this case each of the three has a several estate.

§ 3. But the most material thing to be observed under this
 head is the entirety of interest of husband and wife; this has
 been already noticed in Ch. 42, a. 2, in the cases there con-
 sidered of *Holt v. Holt*, *Dutch v. Manning*, *Doe v. Parrott*,
Shaw v. Hearsey, &c. Since that article was written our
 Supreme Judicial Court has further decided in this case, that
 a devise of land to husband and wife creates a joint-tenancy,
 notwithstanding the act of March 9, 1786. This was a de-
 vise made May 25, 1800: viz. "I give unto my son-in-law,
 Eliphalet Fox, and my daughter Elizabeth, his wife, three
 fourths of all my real estate, and three fourths of the thirds given
 to my wife after her decease." Elizabeth Fox conveyed to
 Fletcher. Held, this case was like *Shaw v. Hearsey* & al. not
 being within the words of that act, two or more persons. There-
 fore, husband and wife being but one person, a devise or con-
 veyance of lands to them is, since said statute of March 1786,
 the same as before it was passed, husband and wife not being
 two persons within the meaning of that act.

8 Mass. R.
 274,
Fox v.
Fletcher.

ART. 6. *Massachusetts statutes.*

CH. 134.

Art. 6.

§ 1. This is an important act, and materially affects these estates in common &c. The 1st section enacts, "that if any person holding any lands in common and undivided, shall cut down, destroy, or carry away any trees, timber, wood, or underwood whatsoever, standing or lying on such lands, or shall dig up or carry off any stone or ore, or any other valuable matter, or make any other strip or waste thereon, without first giving notice in writing under his or their hands, unto all the persons interested therein, or to their agents, factors, or attorneys, forty days beforehand, setting forth that he or they have occasion for, and shall enter upon and improve such lot or lots of land, lying in common as aforesaid," he forfeits 40s. for every tree one foot diameter at three feet from the ground, and for larger trees three times the value and 40s., and for every lesser tree 20s., and for other "wood or underwood so cut down, destroyed, or carried away, treble the value thereof, and treble damages for any other strip or waste;" and any one or more interested may have trespass for the forfeitures "in his or their own names, as well on behalf of the other co-tenants, except the deft., without being held to name them in the writ, as for him or themselves;" one moiety to the use of the prosecutor and the other to the use of all the cotenants, except the deft. in proportion to their interests.

Mass. Act,
March 9,
1786, c. 62.—
Maine Act,
ch. 35.

§ 2. Sect. 2d enacts, "that all persons having or holding, or that hereafter shall have or hold, any lands, tenements, or hereditaments, as tenants in common, joint-tenants, or coparceners, may be compelled, by writ of partition at the common law to divide the same. And when any writ shall be brought and served at the suit of any one or more persons, so interested in any lot or lots of land, tenements, or hereditaments, or a petition shall be pending in any court for a partition of the same, no person or persons whatsoever, having a right or interest in any such lands, tenements, or hereditaments, or holding any share or part of the same in common, as aforesaid, while such suit or petition is pending, shall or may cut down, destroy, or carry away trees, timber, wood or underwood, stone or ore, or other valuable matter whatsoever, standing, growing, or lying on, or belonging to such lands; or shall otherwise hurt or damage any such lands, tenements, or hereditaments, until partition can be made of the same according to law, on pain that every person or persons so offending shall incur the like forfeitures and penalties as are" mentioned in the first section,—and so to be recovered, and to such uses.

§ 3. "And to prevent any doubts respecting the manner heirs are to prosecute in the courts of law for possession of

CH. 134. inheritances, descended to them from a common ancestor,"

Art. 6. sect. 3, enacts, "that in actions of waste, ejectment, or other real actions, where possession of the inheritance alleged to have descended is the object of the suit, they may all or any two or more of them, join therein, or each one may prosecute for his particular share of such inheritance; and the same rule shall extend to joint-tenants who are or may be disseized."

§ 4. The preamble of the 11th sect. recites that, *joint-tenancies* are often unintentionally created, and that tenancies in common are more "consonant to the genius of republics." And enacts, "that all gifts, grants, feoffments, devises, or other conveyances of any lands, tenements, or hereditaments, which have been, or shall be made to *two or more persons*, whether for years, for life, in tail, or in fee, shall be taken, deemed, and adjudged, to be estates in common, and not in joint-tenancy; unless it has been, or shall be therein said, that the grantees, feoffees, or devisees, shall have or hold the same lands, tenements, or hereditaments, jointly or as joint-tenants, or in joint-tenancy, or to them and the survivor or survivors of them, or unless other words be therein used, clearly and manifestly shewing it to be the intention of the parties to such gifts, grants, feoffments, devises, or other conveyances, that such lands, tenements, and hereditaments should vest and be held as joint estates, and not as estates in common:" Provided, "where any estate has already vested in any survivor or survivors upon the principle of joint-tenancy," it is to be held as if this act had never been passed. This act repeals the act passed March 16, 1784; this new act in force after June 1, 1786; the act of March 16, 1784, abolished the principle of *survivorship*, and continued in force over twenty-six months; so that in that time there was no *survivorship* at all, even though the words made joint-tenancies, on common law principles.

Mass. Act,
March 17,
1784, see Ch
76, a. 14.

§ 5. This act provides, sect. 2, for taking these joint estates &c. in execution for debt, and for giving seizin &c. to the creditor or creditors, and for "describing the same with as much precision as the nature and situation thereof will admit of."

§ 6. As to our laws of descent, whence estates in *parcenary* come, see Ch. 126; our acts for partition, by petition or in our probate process, see Ch. 191; as to proprietors in common &c. see chapter as to proprietaries.

Prov. act,
1693, C. &
P. Laws, 258,
and A. D.
1727, p. 458.

§ 7. The act of the province as to partition by writ was the same, nearly, as the act of March 9, 1786; and the act of 1727, to prevent strip and waste, pending suits, and generally by tenants in common, parceners, and joint-tenants was the same, nearly, as the said act of March 9, 1786; and this act, as to these subjects, is the same as the act of March 16, 1784,

led as above. There have been but very few decisions on statutes, though in substance they have long existed, and long respected the titles and possessions of numerous persons.

CH. 134.
Art. 6.



3. *Further American cases.* In Ch. 42, as to joint interest, and Ch. 112, as to mortgages, and Ch. 113, 191, as to partitions, are stated several American cases relating to joint interests, especially *Appleton v. Boyd*, in which it is decided, that land conveyed in mortgage to secure a debt, is holden in joint-tenancy, notwithstanding said act March 9, 1786.

9. This was a writ of *entry sur disseizin* in the *per.* Plt. entered on his own seizin within 30 years, and alleged the disseizin of John Pitts, who demised to the tenant. And the court held that one joint-tenant cannot convey a part of the land holden in joint-tenancy *by metes and bounds* to a stranger; nor can one entering under such a conveyance be a disseizor of the other joint-tenants, for one joint-tenant cannot be disseized by a stranger unless all are disseized, and the grantee was not disseized, as the grantee entered by his consent. Hence the grantee in such a conveyance gains no seizin by right or by wrong. The partition made by joint-tenants by *arol*, is void, as within the statute of frauds; and though after such partition they occupy in severalty, they remain jointly seized in fee simple.

9 Mass. R. 38,
Porter v. Hill.

§ 10. Timber when open and porous receives water and air which hasten putrefaction in it; good ship timber, therefore, is good oak, cut in the wane of the moon, or in dead of winter, or at such times as wood is found to be most solid and durable. It is questionable if these statutes as to waste, at all make any distinction as to timber and other trees in this State, See Waste, Ch. 78.

Mal. Lex.
Mer. 124.

§ 11. Three joint-tenants, and one of them makes a mortgage; this is a severance of the joint tenancy. So it is severed if there be two joint-tenants of a rent, and one of them disseizes the tenant of the land for a time, the moiety of the rent being suspended by unity of possession. Co. Lit. 188.

1 Bin. 175,
*Simpson's
lessee v. Am-
mon.*

§ 12. *Where one joint-tenant may enter before the other and not destroy the joint-tenancy.* As where the testator devised lands to his two sons in joint tenancy when they severally came of age, and to his executors in the mean time; when the oldest son came of age he entered; and held, he lawfully might, and that the joint-tenancy continued. *Williams J. contra.* But the other judges held, that the entry of the oldest son had effect only as to the *mesne profits*.

Yelv. 183,
*Aylet v.
Choppin.*—
Same case,
Cro. Jam.
259, by the
name of Ayl-
or v. Chop.

§ 13. If a bill be made to A, to pay £10 to C, to be divided between A and B, and to their use, they are several debts,

Yelv. 23, 24;
161, *Stone
& al. v. Brom-
wich.*

CH. 135. and they are not tenants in common. But in cases of interest, as a lease to two to be equally divided, they are tenants in common. They must join in an action for divesting their water course, for it is personal, and "does not concern the title, but only the possession, whereby the profits of the land are diminished."

Art. 1.

CHAPTER CXXXV.

ESTATES IN REMAINDER AND REVERSION.

ART. 1. *General principles*, continued from Ch. 114, a. 20 to a. 26.

Fearne, 5, 9. § 1. Mr. Fearne (in Ch. 114.) states four sorts of remainders: 1. Those which depend entirely on a *contingent* determination of the preceding estate itself: 2. Those where the contingency, on which the remainder is to take effect, is independent of the determination of the preceding estate: 3. Those where the remainder is limited to take effect on an event, which, though it must certainly happen some time or other, yet may not happen till after the determination of the particular estate: and 4. Those where a remainder is limited to a person not ascertained, or not in being at the time when such limitation is made. See cases explaining each, Fearne, 5 to 9; 3 Co. 19, 20, 21, Boraston's case, often cited in this work to different purposes.

Ch. 135, a. 2, s. 17.—2
Cruise, 315.
—Fearne, 20.
§ 2. Exceptions from these four sorts of remainders. As to the first, *conditional or contingent limitations*, are not to be included in them, but to be distinguished from them. As to the third sort, from these, those must be excepted where land is limited to one for a term of years, if he live so long, and after his decease, to another, and the term of years is of so long duration that, by common possibility, the party cannot survive it, as a term of ninety-nine years for instance. See cases in illustration of this principle, art. 5, 6. *Secus* as to terms of twenty or thirty, or even sixty years. *Id.* 2 Cruise, 266,—was a term of sixty years, and held not of sufficient duration. *Berrington v. Parkhurst*, 3 Atk. 135; *Willes*, 327,—was for ninety-nine years, and held of adequate duration. As to the fourth sort, those cases must be excepted where land is

Beverly v.
Beverly,
Fearne, 22.—
2 Cruise, 272.

limited to a person for his life, and after his decease to his heirs, or to the heirs of his body. In such cases, by an ancient rule, seen in Shelly's case, the inheritance is held to be immediately executed in the ancestor; hence, not in contingency or suspense. See Shelly's case, largely considered, Ch. 125, a. 4. s. 8, 9, 13; also Ch. 117, a. 2, s. 15; and Ch. 135, a. 1. s. 6; and Fearn, 28, 30, 34, 35, &c. And in this case the court agreed, that if an estate to a woman during widowhood, remainder to the heirs of her body, is an estate tail vested in her. For a life estate vested in her to whose issue the fee tail was limited, though her life estate might terminate before her death, and another estate might come between her estate during widowhood and that to her issue; still there was a freehold in her, and a mediate estate to the heirs of her body, which, on the common principle, united and made a fee tail vested in her. Many distinctions on Shelly's case, Fearn, 28 to 90, most of which will be found in several parts in this work, taken from the original cases, and various authors.

CH. 135.
Art. 1.

Merrill v.
Rumsey,
Fearn, 31.
—4 Cruise,
448.

§ 3. That uncertainty which makes a remainder *contingent*, is very different from that uncertainty which makes it doubtful if it will vest in *possession*. As if a lease be to A for life, remainder to B for life; here, though B may die before A, so B's estate never come into *possession*, yet his remainder is *vested in interest*. For though the *possession* in this and other ways may fail, that does not prevent a remainder vesting in *interest*, absolutely limited to a person *in esse*, and *ascertained* on a particular estate, the determination of which does not depend on any uncertain event.

2 Cruise, 269.
—Fearn,
215, 216.

§ 4. An *intervening* remainder may be *contingent*, and a *subsequent* one *vested*, if the former be not in fee. 2 Cruise, 279,—and Williams v. Duke of Bolton; Lewis Bowles' case, 11 Co. 79.

Uvedall v.
Uvedall, 2
Rol. Abr. 119.

§ 5. The uncertainty which makes a remainder *contingent*, is its originally being limited on a *dubious* event, or to a *dubious* person, and the event or the persons being yet in suspense, and not the uncertainty of its vesting in *possession*. As to *possession*, every estate in remainder for life, or in tail, on an estate for life, is uncertain, as he in remainder may die first, or otherwise defeat his estate before the particular estate ends.

Fearn, 215,
216.

§ 6. If estates be subject to a general power of appointment, this does not suspend the effect of the limitations subject to it; but they vest, subject to be divested by a subsequent execution of the power.

Fearn, 226.
—2 Cruise,
287, 288.

§ 7. The event on which a *contingent* remainder may be limited, must be a legal act. For the law will not aid or

2 Co. 51.—
Cro. El. 609.
—2 Cruise,
307, 308.

301, &c.—Co. L. 264.—2 Cruise,

CH. 135. recognise any act or thing against law, morality, or religion.
Art. 1. Must be *potentia propinqua*. (See Ch. 1. a. 5 s. 1.) Must not be repugnant to itself, or to any rule of law, or to the nature of the estate; (see Ch. 114, a. 31, s. 35, 36; 6 Co. 40; 4 Burr. 1941;) nor operate to abridge the particular estate, for it is in the nature of a remainder to wait till that estate naturally expires. See *Cogan v. Cogan & al.* Ch. 35, a. 2, s. 17.

Fearne 249,
 256, &c.—
 Ch. 111, a. 5,
 s. 1.—Ch.
 125, a. 5. s.
 41 to 55.—
 2 Cruise, 315,
 &c. cites
 Fearne, 420.
 —8 Co. 74.
 —Fearne,
 279, &c.

8. *Conditions &c.* No remainder can be limited on a condition, for it would operate to abridge the particular estate, and the donor's entry for condition broken, would defeat the remainder, and it avoids the whole estate to which it is annexed. But in a devise, a condition is often construed a conditional limitation. *Shuttleworth v. Barber*; *Wilcock v. Hammond*, Fearne, 272. A condition not always construed a limitation. Ch. 125, a. 5, s. 44, *Gulliver v. Ashby*. Estates may be enlarged on condition, as well of things in grant as livery. But such estate for years, for life, or in tail, to be enlarged, must have four incidents. See these stated, Lord Stafford's case, Ch. 114. a. 31, s. 29.

Fearne, 285,
 286, 288.

§ 9. A term for years in remainder does not require a freehold estate to precede and support it. But otherwise as to a contingent freehold remainder. See Ch. 114, a. 21, s. 3. But a right of entry actually existing into such freehold, is sufficient &c.

§ 10. In creating a remainder there must always be a tenant of the freehold in possession to answer the *præcipes* of third persons; and the freehold services, and the remainder and prior estate must ever join. But a contingent remainder in abeyance, as to one unborn, may return to, and revest in the donor, if such one never be born; and one may take a remainder, though no party to the indenture that creates it; or rather, the remainder is in the donor till the contingency happens.

Co. L. 18.—
 10 Co. 97.—
 2 Cruise, 261,
 269.

§ 11. Though after an estate for years, for life, or in tail, there may be a remainder, even to one unborn, yet there cannot be one after a fee, even a base, or qualified fee, except as in art. 5. s. 16.

2 Cruise, 452,
 453—Fearne
 366, *Vick v.*
Edwards.—
 Fearne, 358,
 359.

§ 12. Though formerly, contingent remainders before vested were not devisable by those entitled to them, yet in modern cases it has been decided, that if descendible, they are devisable, and pass by fine by way of *estoppel*. *Weale v. Lower*. Though the fine at first pass no interest, yet it estops the heir, and on the contingency happening, the estate, by estoppel, becomes an estate in interest in him entitled to it. Though at law a contingent remainder can pass only by estoppel, by fine or recovery and voucher, yet it is assignable in equity.

§ 13. If one lease lands for years, there is no *reversion* till the lessee enters, or the lessor waives the possession. Co.L. 46. CH. 135.
Art. 2.

§ 14. A reversion on an estate tail is of but little value, as it is distant, and may be docked and defeated. 4 Com. D.
Estates, B.
11.

§ 15. A remainder always means *the whole or entire* estate in remainder, that is, every particle of the estate except what is in the deed or will not carved out as particular estate or estates, and as to time and quantity.

§ 16. When the legal fee is vested in trustees in trust, no preceding particular estate of freehold is necessary to support contingent remainders or limitations, as this legal estate so vested is sufficient, so not necessary such remainder vest when the prior trust limitation expires. And trustees have a fee without words of limitation, where the ends of the trust require it, (art. 5, s. 26,) and they must do certain acts to fulfil the trust. See Ch. 114, a. 12, s. 4. Ferne, 308,
304, &c.
Chapman v.
Blisset.—1
Ves. 491.—
3 Burr. 1686.

§ 17. *Destroying contingent remainders.* Not destroyed by a conveyance to a use, nor by a conveyance by *cestui que use*. Nor does a bargain and sale, or lease and release by tenant for life, destroy a contingent remainder, depending on his life estate. 2 Cruise, 360 to 366. See a. 6, s. 27. Ferne, 321,
&c.

ART. 2. Of reversions.

§ 1. A *reversion* is the residue of an estate left in the grantor, to commence in possession or enjoyment, after a particular estate granted by him is determined. As if A be seized in fee, and make a gift in tail, the reversion of the fee is still in him. And so a reversion continues in the lessor after he has granted or leased an estate for life, or years, or at will, and this particular estate is carved out of the fee simple estate he has, and the residue rests in him. The fee simple of land must always abide somewhere; and if he who has before had the whole fee simple, carves out a small estate, or a part, and grants it away, whatever is not so granted, is a reversion resting in him. A reversion is never created by deed or writing, yet it is a residue so remaining, the result of a particular estate's being so carved out, and created by deed or writing generally. It arises in this way; and therefore it is said, though not very accurately, that it arises by construction of law. A *remainder* is limited directly by deed or devise, and thus only. Either may be conveyed whenever vested in interest. Each is an estate *in presenti*, as soon as actually vested, though it takes effect as to *possession* and enjoyment *in futuro*. 2 Bl. Com.
175.—Co.
Lit. 22.—
Cowp. 363.
2 Cruise, 454.
—1 Maule &
Sel. R. 234.

§ 2. Rent is usually incident to a *reversion*; but they are not so connected but that the rent may be granted away, and the reversion reserved, and *vice versa*, by special provision. 4 Com. D.
Estates, B 10.
—Salk 691.
—2 Cruise,
454, 455, &c.

CH. 135. But by a general grant of a reversion, the rent will pass as incident to it.

3 Lev. 360.—
1 Maule &
Sel. R. 234.

§ 3. An injury may be both to the particular tenant and to him in reversion. Therefore, if A lease a house to B for years, and it is burnt by *my negligence*, A may sue me for damages to his inheritance or *reversion*, and B for damages to his *possession*. So if I overflow the land adjoining mine, and cause the trees to rot, *he in reversion* may sue me for damages to his *reversion*, and the *termor* for damages to his possession; for the trees belong to the *reversioner*, and the shade &c. to the tenant for years.

1 Bac. Abr.
39.

Co. Lit. 22.

§ 4. On a gift in tail, by operation of West. 2. c. 1. *de donis*, the possibility of *reverter*, that before existed, is turned into a reversion in the donor; and since the statute of uses, if one make a feoffment to the use of B for life, or in tail, and afterwards to the right heirs of the feoffor, the reversion is in him; for the use is continuing in him, and the statute executes the possession to the use.

Salk. 501.

Dyer, 237,
Bromely v.
Bennet.

§ 5. *Reversion and not a remainder*. Husband and wife levied a fine of his estate to the use of the husband and wife for life, remainder to A for life, remainder to the right heirs of the husband; he and A die in the life time of the wife; she has the reversion for her life, and the husband's heir has not a remainder; but the remainder is in the husband and his heirs as a *reversion* only; "because the husband, seized of an estate in fee, could not limit the fee simple to his own right heirs, by way of remainder, where it never was out of his person." Reversions are vested interests. 2 Cruise, 457.

Co. Lit. 46.

§ 6. But if a man lease lands for years, there is no reversion till the lessee enters, or the lessor waives the possession. On the other hand, if a feoffment be made to the use of the feoffor in tail, and afterwards to the feoffee and his heirs, the feoffee has no reversion, but a remainder. A reversion upon an estate tail is of but very little value, not only because it is so distant, but because also it may be docked by a common recovery, and may possibly continue for ever.

Co. Lit. 22.

10 Co. 107,
in Lofield's
case.

§ 7. The court resolved that by a demise of the land for life the reversion thereof will pass; but by a grant of the reversion of land, land in possession will not pass. Here a lease was made for years, if the lessee lived so long, then the lessor granted by indenture to another to hold the reversion to him for life, rendering 9s. 4d. a year to the grantor and his heirs when said reversion should happen; the lessee died, and the lessor distrained for arrears of rent as well before the death of the lessee as after. Held further, that by the grant of the land to hold the reversion &c. for life after the death, surrender, or forfeiture of the lessee &c. the *habendum* was good,

in judgment of law only the reversion was granted by the premises; and when a reversion is granted *habendum* the word, the *habendum* is good. And in this case the rent did not commence till the reversion fell into possession; and the words, *when the said reversion shall happen or fall*, shall be construed according to the intent of the parties, which was not that the grantee for life should pay the rent reserved before he might take the profits out of which to raise it. CH. 135. Art. 2.

If one have no reversion and grant his reversion, the land a possession passes not; "for by the name of a reversion lands in possession cannot pass; but by the name of *land* a reversion may well pass, for he who will grant lands in possession will rather grant them in reversion, but not so *e converso*." And if the *habendum* be to hold the land, that alters not the case, nor will the words, *other premises*, alter the case, for these words mean another thing. Cro. Car. 400.

One's reversion never in his possession is liable for his debts. As if A seized in fee devises to his wife for life, and reversion descends to his sons, one dies, living the wife, his reversion is so liable. 14 Mass. R. 88.

§ 8. By the English and our law a reversion or remainder may be devised, but not after an estate in fee, nor can such be granted. And if lessor disseize A, lessee for life, and lease to B for A's life, remainder to C in fee, and A enters, C may devise his remainder.

§ 9. Wherever lands are given to two men or to two women, or any two persons who cannot marry and the heirs of their bodies, though joint-tenants for life, they have several inheritances, and thereof there is no survivorship. And as the inheritances are several, the reversions thereon are several also; and "if any of the donees die without issue, the donor after the death of all the donees shall enter into a moiety or a third part &c.;" and if the donor grant over his reversion to two, the grantees are joint-tenants of the reversion of each estate tail. Co. Lit. 182, 183, 184.

§ 10. If a joint-tenant make a lease for life, he severs the jointure, and the freehold being severed from the jointure, the reversion depending on the freehold is severed also. So two joint-tenants for years, and one leases his part for years, the jointure is severed, for the lease for years in possession in the one cannot stand in jointure with the reversion in the other, expectant on a lease for years; and if a rent be reserved on such lease, the lessor alone has it. But if two joint-tenants join in a lease for life, reserving a rent to one of them, both shall have it in respect of their joint reversion, unless the reservation be by indenture; and if they reserve the reversion by deed poll, or indenture to one of them only, both shall Co. Lit. 192

CH. 135. have it, because the reservation of the reversion is void, ~~as~~
 Art. 2. they had the reversion before.

§ 11. *By what words a reversion will pass in a will &c.*
 Ch. 127, a. 1, One seized of two several estates for life, remainder in tail and
 s. 9.—1 in fee in N. and G., and also entitled to a reversion in fee of
 Cowp. 808, another estate in G. after several estates in tail to several per-
 Atkyns v. sons, one of whom had a son eighteen years old, devised all
 affirmed in the his estates, and "all and every his lands, tenements, and here-
 House of ditaments whatsoever," situated in or near P. or elsewhere in
 Lords.— the said county of G. to his executors to sell &c.; held, his
 6 Cruise, 220 remoter reversion passed by the general words, *elsewhere in*
 to 229.—1 *the county of Gloucester*, and to provide for other children
 W. Bl. 200.— than the heir at law. See *Freeman v. Duke of Chandos*, Cowp.
 4 D. & E. 363, to the same point; *Strong v. Teat*, 2 Burr. 912; *Roe*
 605.—2 W. *v. Fulham*, Willes, 303, 311. Devise of a ground rent on a
 Bl. 736, Doe lease for years the reversion passes. *Maundy v. Maundy*, 2
 v. Saunders. Stra. 1020.

Cowp. 420.— If one devise a reversion to his heir at law, and afterwards
 2 Bos. & P. gives all the residue and remainder of his real and personal
 609.—3 East, estate to A in fee, the reversion does not pass by the residu-
 516, Camfield ary devise. 1 East, 456, 459, *Doe v. Meakin*, 6 Cruise, 202,
 v. Gilbert.— &c. So where one makes several bequests, and devises all
 1 Lev. 212.— her effects whatever and wherever to several persons to be
 Saud. 180.— divided &c. by her executors, a reversion does not pass,—and
 2 Vern. 461. especially by reason of the words, *effects and executors*. *Good-*
title v. Miles, 6 East, 494; 1 East, 33, *Doe v. White*. A
 devise of all I am worth carries a fee. 1 Br. Ch. R. 437,
Huxtep v. Brooman. Other cases of reversions devised, 10
 Ves. jun. 101; 12 Ves. jun. 426; 2 Vent. 357; 3 P. W. 26;
 3 Ves. jun. 725; 5 Ves. jun. 300; Eq. Ca. Abr. 211, 212;
 5 Mod. 229; Skin. 631.

§ 12. *Where a reversion descending on the prior tenant*
 6 Bac. Abr. *does not destroy a contingent remainder*. As if one devise
 768, 769, Am. lands to A, his eldest son, for life, and if he die without issue
 ed.—Plunkett living at his death, then to B, his second son, and his heirs,
 v. Holmes, but if A have issue living at the time of his death, then the
 2 Cruise, 366, lands to remain to him and his heirs. The testator died, A
 442, 445. entered and suffered a common recovery and died without
 Two contin- issue, having by his will devised the lands to Holmes, the
 gent estates deft. B entered and leased to the plt. The question was,
 in fee limited in this case if A had a life estate only by his father's will, with a contin-
 in the alter- gent remainder to B; or if a fee was vested in A with an
 native.— executory devise to B. Held, A had but an estate for life
 2 Cruise, 281, by the will, and the remainder to his heir, was not executed;—
 282. for life only because only a life estate was devised to him
 and no fee, and no fee tail, as it was not dying without issue
 indefinitely. Also held, that both remainders to A and to B

were on a contingency, not a contingency upon a contingency, which the law will not allow, for then by the same reason it might allow a hundred contingencies one after another, and so elude the statute *quia emptores*, but one looking several ways, to wit, if A have issue living at his death, then to him and his heirs, but if not, then to B and his heirs. So A was viewed as a stranger, but he was the heir at law, and the reversion descended on him, but the court said not so absolutely, as to merge his life estate given by the will against its express words and intent. But there shall be an *hiatus* or opening to let in the remainders when they happen; and though A happen to be heir at law, yet this being matter *dehors* the will, no use shall be made of it in expounding the will. And so was Archer's case, where, though Robert, the devisee for life, was heir, yet the remainder to his next male heir was a good contingent remainder, and his life estate not merged in the fee descended on him: 2. If B's remainder be contingent, it is clearly destroyed by the recovery, and so would be by a bare surrender of his life estate: 3. Held, the well established doctrine, if it would be made a contingent remainder it should be so taken, rather than an executory devise not barrable by such recovery, but tending to a perpetuity: 4. Held further, the fee was not in *abeyance*, but descended to A as heir at law subject to such *hiatus*, and as to B, the devisee in remainder, A had but an estate for life: 5. It was well argued that if the whole fee be devised to one, there can be no remainder, as nothing remains, but if any after estate it must be an executory devise. But in *Fortescue v. Abbot*, the life estate was deemed so to merge. p. 767.

§ 13. *Fortescue v. Abbot* was thus: one having three sons, A, B, and C, devised lands to them severally, without limitation of any estate, and if any of them died, his part to remain to the others equally to be divided between them. A died, having first granted the land for 1000 years to the deft. Held, though by the descent of the fee on A, the eldest son, his estate for life was merged, and so the contingent remainders to the other sons destroyed, (contingent because not known which son would survive) yet it should be good to them by executory devise, and that this was the most reasonable construction to support the testator's intention. Here the remainder was preserved, by considering a devise on a contingency, with a prior freehold in the same will, an executory devise. But *quære*, if this was an executory devise, there being a prior freehold by construction.

§ 14. *But a reversion descended &c. destroyed such remainders.* As where the father conveyed lands to the use of him-

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Art. 2.

5 Fac. Abr.
767, Am. ed.
Fortescue v.
Abbot —
2 Lev. 200.
See *Boothby*
v. Vernon,
Ch. 130, a. 3,
s. 19 —
2 Cruise, 297,
—*Fearne*,
342.

Vent. 306.—
2 Jon. 76.—

3 Keb. 731,
Hartpool v.
Kent.—
Fearne, 338,
338, &c. 342.

CH. 135. self for life, remainder to the first and other sons of his only son in tail male successively, remainder to the heirs of the father's body, or to his right heirs. The father died before any son of his son was born; so the fee or fee tail descended on the son; and the question was, if the contingent remainders were destroyed; argued they were not, because the inheritance came to the son by descent, an act in law, and not by his own act, and the law does no wrong, and so shall not destroy the contingent remainders; but on a son's birth the estate shall open to let them in. But the court held, they were destroyed by the descent of the reversion on the son, on the case of *Wood v. Ingersol*; and said this case differed from *Plunkett v. Holmes, &c.* in which the estates were united at first upon making the conveyance, and if not afterwards opened to let in the remainders, the conveyance would destroy itself. But here this descent was an act subsequent to the conveyance and altered to estates limited by it, so had destroyed the contingent remainders created on a life estate in the father &c. See art. 5, s. 27.

5 Bac. Abr.
Am. ed. 770,
Hooker v.
Hooker.—
2 Cruise, 268.

§ 15. Like principle, where lands were conveyed to the use of A and his wife for life, remainder to the use of B, the son of A, for life, remainder to the first and other sons of B in tail, remainder to A in fee. A and his wife died, living B, and he afterwards died without issue, leaving a wife. Held, she was entitled to dower in this estate, for B's estate for life merged in the inheritance by the descent upon him, and the contingent remainders were destroyed.

6 Bac. Abr.
785, Am. ed.
—9 H. VI.
74, 20.—Roll.
R 217.—
Palmer, 134.

§ 16. *Fee in reversion descends &c.* As where a testator devises land to A for life, and if he die without issue, then B to have it. Held, A has but an estate for life by express words, and so he shall have no greater estate by implication against the express words; but the words, *if he die without issue*, are only a condition, upon the happening or not happening whereof, the remainder to B is to vest or not vest; and being used only for that purpose seem to be confined to his having no issue at the time of his death; and then in the mean time the fee or reversion on A's life estate descends to the heir at law. Three material points are decided in this case: 1. That a devise expressly made governs one by implication: 2. That the words, *if he die without issue*, even when applied to lands and freeholds, may be construed to mean dying *without issue* at the time of his death: 3. That a reversion in fee descending to the heir at law contingently devised will vest on the contingency's happening.

Like rule as to a life estate in Cro. Car. 366, in a case of a surrender. The words, *for want of issue*, are the condition
Seagood v.
Hone & ux., 5
Cruise, 556.—
Allen v. Nash, 6 Cruise, 481, 497.

which the remainder over is to arise, or not arise. So if **CH. 135.**
 se be made to A for life, and if he die without issue, it **Art. 2.**
 remain to B &c. 1 Brownl. ; 1 Mod. 52. And the
 reversion so descends in the mean time.—And see *Love v.*
Edham, Ch. 130, a. 6, s. 10. So the reversion of a term
 es to the executor of the deviser, when the remainder
 sed over is void. 1 Mod. 52 ; see Ch. 114, a. 31, s. 11.
 l reversions after estates for years, are present assets,
Cruise, 458,)—after estates for life, *quasi* assets, (460,)—
 or estates in tail are assets when they come into possession,
 O,) because of no value before.

§ 17. *Conditions and limitations.* Differences between **Cro. El. 360,**
 em in creating remainders and reversions. A condition **Cogan v. Co-**
ridges the estate first given, to let in a remainder or rever- **gan.**
 on, on some act to be done or omitted by grantor or grantee,
 e., or on some event to happen, continuing the first or prior
 tate. A *limitation* bounds and limits the prior estate to **2 Cruise, 311.**
 ontinue so long, and so long only. Then, till the act done,
 event happens or not, it continues, and when either hap-
 ens, this estate, *ipso facto*, ceases and ends, as certainly as an
 state created for A's life, ends by his death. And on an
 state so limited and ending, a remainder may as well depend,
 s on an estate for life or years, but not on a condition. For
 instance, A seized in fee of land, lets it to B for life, re-
 mainder to C for life, provided if A have a son during his life,
 hat lives to the age of five years, then the estate limited to
 C shall cease, and remain to such son in tail. A has such son
 so living. Held, the remainder to the son was void. Because,
 1. It was a condition, which, on the event's happening, abridges
 and shortens C's life estate before given : 2. So the law is
 the same as to things in *grant*, as in *livery* ; for here it is
 not the particular estate to B that is to cease, on the condition
 or event's happening, but C's remainder thereon, and his
 remainder lies in grant : 3. Here, though the condition is
 not annexed to B's first estate, yet is to C's, immediately pre-
 ceding the son's remainder, so the same as if for life, and on
 condition to be abridged, and to cease and remain over :
 4. The son's remainder is not to begin but on *condition per-*
formed, and so the condition precedes the commencement of
 it : 5. This case proves that only the lessor and his heirs
 can take advantage of a condition, so the remainder to the
 son, a *stranger*, cannot arise by it : 6. That as this remainder
 to the son is limited to begin on a condition precedent, of
 which only the lessor and his heirs can take advantage, it is
 defeated, or rather never can arise, because it never can
 take effect on the terms prescribed for its vesting : 7. The
 court held, that an entry was necessary to shorten and put an

CH. 135. end to C's life estate, "for a freehold cannot determine without the ceremony of entry," or claim, and the rule applies as well to a freehold in remainder, as in possession. The principle seems to be this:—where an estate, created for a specified time, as for one's life, or forty years, is to be *shortened*, and so to continue a less time than for his life or forty years, in order, on some after event's happening, to let into the estate one in remainder or reversion, the first estate must be viewed and treated as one on *condition*. But when *limited* in its creation to continue only so long, it ceases of course when that time expires. This is the case of a deed, but not of a will. In a will the remainder may destroy the condition &c. So in cases of uses.

Portington's
case, 10 Co.
41.—Dyer,
127.

§ 18. *Condition made a limitation.* As where A seized in fee of land, and having three sons, B, C, and D, devised it to his wife for life, on condition she herself educate his boys in literature and good morals, remainder to D his son, in tail, and died. She entered, and made a breach of the condition. Question, if B as heir should enter for condition broken, or if D should enter as by limitation, or if the condition was destroyed by the limitation over. Held, it was no limitation, because of the *express words of condition*, and if a condition, then the heir by his entry for the breach of it would also defeat the remainder; this is not reasonable; so held, that by the limitation over, the condition was destroyed. But according to Dyer, the condition was not destroyed, but for breach of it the heirs entered, and held for the wife's life, and after her death D had it, and inferred he had it by executory devise. Here it will be observed, that notwithstanding the *express condition*, and the rigid rules of law, the court considered the limitation over destroyed the condition, in order to give effect to the intentions of the testator. So a condition made a limitation.

See Ch. 111.
a. 5.

5 Bac. Abr.
Am. ed. 803.
—2 Mod. 26.
—Leon. 283.
—Mod. 86,
300—Plow.
27, 414—
Ventr. 199.—
2 Lev. 21.—
Ch. 125, a. 5,
s. 44.—2 Roll.
R. 225—2
Mod. 7.—3
Mod. 28.—
Cro. El. 146.
—Stubbe's
case, Dyer,
117.

§ 19. But now it is understood the devisee in remainder shall enter for breach of the condition annexed to the first estate, be it devised to a stranger, or to the heir at law. This construction was introduced to support the testator's intentions. And held, that by non-payment of the sum, or non-performance of the thing to be done, the estate of the first devisee determined immediately, without entry or claim, and then the remainder succeeded, as if there had been no condition at all. And so they changed the condition into a limitation. Cites Wilcock v. Hammond, Cro. El. 204; 3 Co. 20; 2 Leon. 114; Cro. Jam. 592; Roll. R. 219, &c. So Cro. El. 319, 383; Moor 891; Vaug. 271. And many other cases are found in the books to the same purpose. But though a condition will thus be turned into a limitation, and sometimes a

remainder into an executory devise, yet it is a settled rule, **CH. 135.**
 that he in remainder &c. cannot enter or claim till his estate **Art. 3.**
 actually vests in him. Hence if a widow put an end to her
 estate by her marrying, he in remainder &c. cannot claim
 till her death, if his estate be so created, and in the mean-
 time the heir has it in reversion. 5 Bac. Am. ed. 805; 10
 Co. 40.

§ 20. *Contingent estates* are assignable, are descendible, 2 Cruise, 452,
 and transmissible to heirs and executors;—may pass by estop- 453, 261.
 pel;—assigned in equity, and devised by will, before they
 vest,—*secus*, formerly.

ART. 3. *Remainders.*

§ 1. A remainder is the remnant or residue of an estate in **Co. Lit. 49,**
 land, depending upon a particular estate, and created with 143.
 in the same conveyance or devise, the essential properties
 of which are noticed, Ch. 114, a. 20, &c. As if I make a
 gift to A for years, life, or in tail, and to B in fee or in tail,
 B has a remainder in fee or in tail, and it is good. And I
 may grant an estate to A for life, remainder to B in tail, and 4 Com. D.
 if he dies without issue, to C for years; and this estate for **Estates, B. 13,**
 years is good, after B's death without issue. And so there 14, 15, 16, 17,
 may be a remainder for years, after a prior term for years. 18, 19.—
Raym. 142.

§ 2. It is absolutely essential to a remainder, that it join to
 the particular estate, and admit no estate between them, and
 that it vest, in interest at least, before or at the moment this
 ends. See Ch. 114; 4 Com. D. 14, 15; Pl. Com. 29; Co.
 Lit. 298. And is good if the surrender of the particular estate
 be void. Salk. 577. For a void surrender is as none; as one
 by a *non compos*. And the remainder is not destroyed if the
 particular estate be not destroyed, though granted to another 4 Com. D. 14,
 before the remainder happens, as the grantee's estate supports 16, 16, 17.
 the contingent remainder. So if the particular estate be in
 two joint-tenants, and one releases to the other. So if lessee
 for life &c. be disseized, the contingent remainder is not de-
 stroyed, for the tenant for life has a present right of entry,
 sufficient to support a contingent remainder. So if A be
 tenant for life, remainder to his wife for life, remainder to B,
 remainder to B's eldest son, A makes a feoffment, remainder
 to said son is not destroyed. For by the feoffment the estate
 of A and wife is lost, by which B has a present right of entry.
 And if lessee for life do not enter, yet after his death the
 first feoffees may enter to revive the contingent estate. But
quare if lessee for life neglect to enter till his right of entry
 is gone. And *quare* if the feoffees bar their entry by some
 act of theirs. And the particular estate is sufficient, though
 once merged or destroyed, if revived before the remainder
 happens. As if lessee for life, on whose estate a contingent

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Art. 4.



remainder depends, makes a feoffment on condition, and enters for condition broken *before* the contingency happens; and 2 Saund. 336, Wms'. Notes; but otherwise, if *after*. When the whole fee is limited to, and vested in one person, with a limitation of a fee to another upon a contingency, this cannot be a remainder; but of necessity is an *executory devise*. Plunkett v. Holmes, 5 Bac. (Am. ed.) 768.

2 Saund. 386,
Pinkay v.
Hurrell.

§ 3. So if *cestui que trust* for life make a feoffment or other conveyance, he forfeits not his estate, nor does it destroy a contingent remainder depending on it; because having no legal estate in him, any conveyance made by him passes only what he can lawfully grant, and a right of entry resides in the trustees, in whom the legal estate is vested.

Salk. 576,
577, Thompson v. Leach.
—Com. 46.
—2 Cruise,
261—Co.
Lit. 298.

§ 4. Though a present right of entry will support a contingent remainder, it is held, that a right of action, or a future right of entry, will not. So the estate of the wife for life will support a contingent remainder, though that of the husband be vested in the king for his treason. But 5 Bac. Abr. (Am. ed.) 755. A right of action will preserve a contingent remainder in any prior freeholder. As where an estate is limited to A for life, remainder to B for life, with contingent remainders over, they are not destroyed by A's feoffment; because B has a right of entry to recontinue his estate, which in law continues in him. "So if B had only a right of action," as if a descent had been cast on the heir of A's feoffee, and put B to his real action. Cites 2 Roll. Abr. 796; 1 Vent. 188. *Quare* as to the right of action.

The contingent remainder is good, if once vested before the particular estate is defeated.

7 D. & E. 433,
Doe v. Hleks.

§ 5. How trustees are made such for the *life* estates only, and not trustees of the several *remainders* in the same will.

ART. 4. *The freehold must be disposed of.*

§ 1. Remainder is a relative term, and means some part of the estate is previously disposed of, and in creating a remainder or remainders, all the parts of the estate disposed of must constitute the whole. Where, from the creation of it, a remainder is *vested*, the prior estate may be a term for years, but not at will. But where the freehold remainder is contingent, the prior estate must be a freehold at least, because the freehold must be disposed of when the estates are created; and it cannot be to him in remainder, as his estate is contingent, either because not in being to take, or because it is to vest in him on some future event, and so vests not in him till that happens; and not to a tenant for years, as he is not capable of taking a freehold to his own use, nor to another's, where there is no other who can take. And no *freehold* remainder could be created but where livery of seizin was

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en, at the time of the creation, for then the freehold must be conveyed, so as then to create a new tenant of the freehold, without whom no estate in lands could exist for a moment on feudal principles. And it can never pass to one who has but a *contingent* remainder; hence it passes, and every of seizin must be necessarily made in the same devise or conveyance to one made therein, to take a prior vested freehold. And hence if this particular estate be void in its creation, or in any way afterwards defeated, a remainder intended to vest thereon must fail. As if an estate for life in A be made with livery on condition, and a contingent remainder to B in fee or tail, and the grantor of the life estate enters, and avoids for condition broken, before the contingent remainder vests, it must of course fail.

§ 2. The moment the freehold estate was created at common law, it was essential livery of seizin be made of it, and also at that moment the remainder should pass out of the grantor, and commence as a remainder, otherwise the residue would be a reversion remaining in him. As if an estate be made to A for life, remainder to B in fee, here B's remainder in fee must pass from the grantor, the instant the seizin is delivered to A of his life estate in possession.

§ 3. So the freehold particular estate must continue to exist, substantially, and there must be a freehold tenant constantly in being to answer præcipes, &c. created with the *contingent* remainder, till that actually vests, either by the person to whom given becoming able to take it or by the event's happening on which it is to vest. And if this particular estate do not so continue, there is an end of the contingent remainder. So if this estate never exist; as where the particular estate is only *for years*, remainder to B's right heirs, the remainder is void, for B has no heirs while he lives, *nemo hæres vivens*. Hence the freehold vests not in him, tenant for years, nor in B's heir, hence no where, and yet it cannot be in abeyance. 1 Co. 130, a. 134, b. And if tenant for life die, or his estate is destroyed before such heir is born, or before heir in fact, by his ancestor's death, the remainder fails;—and though it be in a use;—and such remainder would be void at common law, if made in possession, whenever the particular estate ends, before the remainder vests, as then some estate comes between them, and if for a moment it destroys the remainder; and in this respect there is “no difference between *uses* and *estates made in possession*.” Mod. 720; 3 Co. 20; 4 Mod. 259; Salk. 226, 229. But a remainder *for years* after a remainder *for years*, is good; for a term for years may be in abeyance. Ray. 142. So if this life estate *merge*, the contingent remainder is gone. As if A be tenant for life, re-

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3 Maul & Sel.
R. 99, Doe v.
Rendle,
Chudleigh's
case.—Cro.
Jam. 260,
Wood v. In-
gersole.—2
Saund. 386.
—2 Lev. 202.
—Sir T.
Jon. 79.—
Pollexf. 481.

remainder to B's right heirs, and remainder to D, in fee; if D die and his estate descend on the tenant for life, so that the life estate drowns or merges in the fee, before the contingency happens, that is before there is an heir of B able to take the remainder is destroyed, or never vests. 1 Co. 135. Otherwise if it can take effect by executory devise. In the case, this deviser devised his land in A to his oldest son John in B, to his son Edward, and in C, to his son William, and that if any of them died, the other surviving shall be his heir. John had a son and died. Held, as but a freehold passed by the devise, the reversion in fee descending on the eldest son merged that estate, and his death after could not revive or vest the remainder in Edward and William; though Fleming J. thought it might vest in them, by way of remainder.—as some say, *springing remainder*.

2 Leo. 70.—
Salk. 238.—
Mod. 371.—
1 Co. 135.—
4 Com. D. 18.
—Salk. 576.
—2 Lev. 39.
Salk 577.—
2 Saund. 387.

§ 4. So if the supporting estate be in tail, and tenant in tail die without issue before the contingent remainder vests, it is gone forever; and though the estates be created by devise. If tenant in tail, remainder to the right heirs of B, makes a limitation in the life of B, the remainder can never vest, for while it is contingent, the prior estate in tail is destroyed by the tortious act of the tenant in tail. And so is the case, though the act, as of a *feme covert*, that destroys the particular estate is *voidable*: and the contingent remainder is not voided if this estate be destroyed, though it be revived *after* the contingency happens, as by entry *after* for condition broken; and if revived before.

1 Salk. 224,
Loddington
v. Kime, 5th
rule.

§ 5. If a remainder to a person *in esse* be contingent, because it commences after a contingent fee to another not *in esse*, if by fine, or otherwise, the particular estate is destroyed before the other comes *in esse*, the remainder to him *in esse* cannot take effect; for where a *concurrent contingent fee* precedes, a subsequent fee, not *in itself* contingent, is so by reason of the first, and is destroyed if the particular estate be destroyed, while the first remainder is contingent,—for as long as that is so, all subsequent ones must be so.

4 East, 313,
Doe v. Elvey.
See Doe v.
Burnsell, so
Doe v.
Holme, 2
Cruise, 282.

§ 6. Devise to A, and the *issue* of his body, *his, her, or their heirs, equally to be divided*, if more than one, and if A have no issue of his body living at his death, then over. Held. A took at least an estate for life, with a *contingent remainder* in fee to his issue, if any, so the remainder over was *contingent*, being a contingency with a *double aspect*; and whatever estate A took, the remainders over were destroyed by his recovery.

See Ch. 125,
a. 7, s. 15.—
Cruise, 260,
261, 269, 270,
271.—
Fearne.

ART. 5. *Remainders, when contingent or vested.*

§ 1. On this point many cases are found; the general rule is, if a remainder be limited to commence upon a contingency,

high, perhaps, will not be before the particular estate determines, the remainder will be *contingent* and does not vest immediately. See *Hodges v. Middleton*, Ch. 129, a. 2; *Ives v. Egg*, Ch. 114, a. 22; Ch. 125, a. 6; Ch. 130, a. 2, *Gulv. v. Wicket*; Ch. 114, a. 31.

2. An estate was made by A to B, (whom he intended marry,) and the heirs of their two bodies. Held, this was an estate for life in B, with a *contingent* remainder to the issue as there never might be issue to take. And the court said, "when an estate is limited to husband and wife and the heirs of their two bodies, the word *heirs* is a word of limitation; because an estate is given to both of the persons from whose bodies the heirs are to issue. But when it is given to one only, and the heirs of two (as to the wife and the heirs of her and A. B.) then the word *heirs* is a word of purchase. No estate tail can be made to one only, and the heirs of one body of that person and another."

3. If the particular estate may end before the remainder commences, it is *contingent*, as a lease to A for life and after his death to remain to C in fee, this remainder is *contingent*, if A die before B, the particular estate determines before the remainder can begin, and a chasm is left between them: see s. 23, 24. So if A have a son, nine years old, and makes a lease till he attains to twenty-one, and after he so attains it, shall remain to B in fee; B's remainder is *contingent*. So when a remainder is limited to take effect on the happening of an act, which act is the end of the particular estate; if this act be merely uncertain, if it will happen or not, whether one will come from Rome to London or not, the remainder is *contingent*.

4. So if an estate be granted to husband and wife for life, and afterwards to the heirs of the survivor; for it is uncertain which will survive, so whether his or her heirs will be entitled to it.

5. A devises lands to his son for life, then to the heirs male or female, lawfully begotten of his son's body, forever, they paying out of the same &c., if not paid, then to B till he is paid, and to return to the sole use of the heir male or female begotten by the son, and to his or her heirs forever, if the son die without issue, then to B; this remainder to B is a *contingent* remainder,—the remainder to the heirs of the body of the son, being a good *contingent* remainder.

See *Goodright v. Dunham*, Ch. 125, a. 5; Ch. 130, a. 2. Devise to George L. for life, heir at law, and after his death to C. B. her heirs and assigns, in case she survive said G. L., but not otherwise, and if she die before him, then to him in fee. Held, the devise to C. B. was a *contingent* remainder,

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2 W. Bl. 728,
Frogmorton v. Wharrey.
—4 Maule &
Sel. R. 88,
Goodright v. Jones.

3 Co. 20,
Boraston's case.—2
Cruise, 295,
Doe v. Lea.—
3 D. & E. 41,
44 & 1 Burr.
228 234.
Goodtitle v. Whitby.—
2 Cruise, 298,
270 to 273.
Fearne.

Co. Lit. 26.

1 Cruise, 292.

Doe v. Holmes, 3
Wils. 237,
241.—2 W.
Bl. 777, *Doe v. Holmes*.—
Doug. 264.—
Salk. 224 —
1 East, 259,
264, *Wood & al. v. Baron*.
2 Bos. & P.
289, 297, *Doe v. Scudamore*.

CH. 135. and barred by a fine levied by George Lane ; also, his fee was a contingent remainder. Remainder depending on one contingency. *Doe v. Cooke*, 7 East, 269.

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P. Com. 33.
—2 Cruise,
261, 265,
Derby's case.
—Lit. R. 370,
Napper v.
Sanders.—
Hutt. 119.—
Pollex, 67.—
2 Vern. 121,
Beverly v.
Beverly ;
secus, a term
of sixty years,
cited 2
Cruise, 266,
272.

Salk. 233.—
1 Ld. Raym.
623.—6
Cruise, 465.—
2 Cruise, 26.

Remainder
vests in one
in interest,
though he
may die be-
fore it vests
in possession,
cites Fearné,
327, 328.—
2 Cruise, 272,
279, Berring-
ton v. Park-
hurst.—
Willes, 327.

Cro. El. 269,
Lord Vaux's
case.—Co.
Lit. 225.—
Moor, 239.

Adverbs of
time &c.
2 Cruise, 396.
—See Ch. 43,
a. 1, s. 6.

§ 6. *Remainder vested.* The general rule is, if a remainder be to commence on a thing casual, but certain in the event, though it be expressed that it shall not commence till the casualty happens, the remainder shall be vested and is not contingent. As if a lease be for ninety-nine years, if B live so long, remainder when B dies to D ; D has a vested remainder ; for it is certain B must die, and the words, *when B dies*, denote the time when the remainder shall take effect in possession. The remainder to D vested immediately in interest, certainly to come into possession on B's death, or if he live over ninety-nine years, then at the end of the term. Hence, there is no uncertainty about the remainder's vesting ; its vesting or taking effect is certain, but the uncertainty goes only to the time of D's coming into possession.

If a devise be made to A in tail, and after his death without issue to B in tail, and if he die without issue, A not being alive, then to C in fee, this remainder to C is vested ; for the words, *A not being alive*, import nothing but what was implied. Here C's estate is limited after the determination of a particular estate.

§ 7. And generally it is a settled rule, that wherever an estate is devised or granted to a person in being and certain, the estate vests immediately in interest, though it may not in possession. As if an estate be conveyed, or granted, or devised to A for years or life, or in tail, remainder to B, B's remainder is immediately vested in interest, though it cannot vest in possession till there shall be an end or termination of A's estate. And a person is certain and ascertained as soon as he is known to be the one intended, and there can be no other. As if the estate be given to the heir of A and A is dead, the person who is his heir is known.

§ 8. So whenever an estate is devised or conveyed to take effect on a certain event, it vests in interest and possession when that event happens, and it vests in interest immediately, if that event must in the course of things necessarily happen. As if to A till he returns to London and comes of age, or dies, and remainder to B, his remainder vests immediately ; for of necessity one event or the other must happen, he must return and come of age, or he must die. So that if either event must necessarily happen, as the party's death in the case put, the estate vests though the other event may never happen.

§ 9. So if the contingency be not a condition precedent, but only the time when the estate is to commence, it is a vested estate. As if an estate be devised to A, and afterwards to

, second, third, and fourth sons in tail, and if the fourth without issue, then to B, he shall take, and his remainder though A has no son, for the prior estates being in fee is a clear remainder left to be immediately disposed of. A's fourth son's dying without issue is no condition precedent to B's taking, but the words only limit the time he shall take.

10. So a devise to A for life if she do not marry, and if she marries, then to B in tail or in fee, the remainder to B is vested and not contingent; for the devise to A is in fact during widowhood, and the limitation to B if A marries is no more than upon the determination of her estate; and marrying is no condition precedent, for whether she marries or not, after her estate ended B is to have the remainder, which vests immediately in interest, and in possession when A's estate terminates by death or marriage. And it is no objection that a remainder as to the possession depends on one of several events, for it comes into possession in all such cases on the happening of the first. The same rules hold if the devise be to A for life till he aliens, then to B, or to him for life if he discontinues, then remainder to B.

11. So if an estate be limited to one in *esse*, after a contingent estate for life or in tail, this remainder is vested in interest immediately, but not if after a contingent estate in fee. *Wise*, 281, 443.

12. This was a devise to the testator's seven sisters, each to have and share alike during their natural lives respectively, after the decease of any of them the part of her or them dying to go to the first and other sons of such of them so living, and the heirs of his and their bodies successively, and in default of such sons, then to the daughters of his said sisters living, as tenants in common, and not as joint-tenants, and the heirs of their respective bodies issuing; but in case any of said seven sisters should die without leaving any issue of her body begotten, or that issue die under age and without issue, then he devised her share among the survivor or survivors of his said seven sisters and their issue; and if all his said seven sisters died without issue, or leaving issue, such issue to take before twenty-one and without issue, then over. The court held, that the words, "*for default of such sons*," did not make the remainder to the daughters contingent, but the remainder to them vested, though a son was born. The testator meant by the words, "*in default of such sons*," "failing of limitation to the sons." Per Eyre C. J. Heath J. said, "it was no unusual thing for words of condition to be taken for words of limitation where there is a remainder over;" and mentioned the rule in *Ives v. Legg*, that "the courts will not

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Ray. 428.—
Mod. 487.—
2 Cro. 697.—
Jones, 57.

1 Salk. 224,
Loddington
v. Kime.

1 Bos. & P.
250, 262,
Doe v. Dacre.

CH. 135. construe a remainder to be contingent where it can be taken
 Art. 5. to be vested ;” also said, that in *Keene v. Dickson* no intention could be collected, not so here. Rooke J. said, that the testator intended that if “the sons and the issue of such sons should fail, the daughters should take ; and that he could not intend that on the birth of a son all the subsequent limitations should be defeated. The words, “*in default of such sons*,” may either mean if there be no sons, or if there be sons and those sons shall die.” He added, “indeed I have been long tired of looking into cases on wills.” Buller J. was of a different opinion, and thought if a son died, the estate was not to go over ; for “if there was a son, that son should take an estate in tail general ;” and so his issue after him. Scores of other cases will be found of vested remainders ; many of which have been already cited, as Ch. 130, a. 2, *Doe v. Perryn* ; Ch. 130, a. 3, *Doe v. Martin* ; Ch. 101, a. 1 ; Ch. 111, a. 6 ; and many cases, Ch. 125, and Ch. 130, &c.

In creating remainders it is an invariable rule, that a man cannot give himself what he has, nor to his heirs what the law gives them. Strictly reversions and remainders are not real estate, but usually are so considered.

14 Mass. R.
 92, *Sawyer v.*
Rogers & al.
 —Mass. S. J.
 Court, Nov.
 Term, 1813,
 Essex.

§ 13. In this case were several material questions : 1. If a remainder was contingent or vested : 2. If a collateral warranty barred the demandant : 3. If the estate should open and let in a child born after the testator died : 4. If the remainder was in joint-tenancy.

§ 14. The facts were, Sylvanus Lakeman of Ipswich, having a wife, a son married five years, but having no children, a daughter, Elizabeth Sawyer, having two children, and a daughter, Rebecca Hovey, having four children ; October 24, 1757, made his will, proved November 22, 1757, and bequeathed his personal estate generally to his wife to pay his debts &c. And as to his real estate he devised : 1. An undivided moiety of it to his wife for her widowhood, into which she entered on his death, and died seized December 1771, a widow : 2. The other undivided moiety to his only son, Abraham, generally,—so for his life ; into this he so entered, and died September 5, 1764.

3d. The testator devised all his real estate (as the words were) to said Abraham in tail general, to come into possession on the wife’s death : 4. Devised to his daughter, Sawyer, an estate in tail general in the moiety of ten and a half acres of land at Manning’s Neck, to come into possession on the wife’s death ; and to his daughter, Hovey, a like estate in the other moiety, so to come into possession.

5th. Immediately after the said devise to Abraham in tail, the testator devised the remainder thereon to the legal heirs

of his two daughters, Rebecca Hovey and Elizabeth Sawyer, **CH. 135.**
 their heirs and assigns forever. **Art. 5.**

6th. The testator devised a small interest in real estate to the four Southerlands, Mrs. Hovey's children by her first husband.

There was no doubt but that the estate for life and in tail in Abraham united in this moiety, and the less merging in the greater, he became seized in tail in possession in this moiety, there being as to this no intermediate estate. 2 Bl. Com. 177. And in the wife's moiety he had a remainder in tail vested in interest, expectant on her death or marriage as to the possession.

Also, it was clear this was a will imperfectly worded ; for by the words of it all three of these estates in tail were to commence after the wife's death, even though she had married and her estate had sooner ended. Also, these words seem to have no regard to Abraham's life estate, even in said ten acres and a half at Manning's Neck. Also, it is clear the words of the will gave Abraham an estate in tail in all the testator's real estate to commence as above, and as the will gives the daughters estates in tail in said ten and a half acres, to commence at the same time, here were estates, on a literal construction in the same ten and a half acres at the same time in different persons : to wit, Abraham and the two daughters. But in neither of these matters could the testator's meaning be according to the words literally taken ; nor could he mean if his wife married and so her estate ended, the next estates in remainder should not vest in possession till her death. So if Abraham had survived the wife, the words of the will directly lapped the daughters' estates in tail in the said ten and a half acres on his moiety. The testator could not mean this.

The court decided that legal heirs of the two daughters meant their children, who took not contingent but vested remainders as purchasers at the testator's death ; but that the estate opened and let in James B. Sawyer, born after the death of the testator and before the estate tail ended. Also held, there was no collateral warranty to bar Mrs. Sawyer's children.

This cause was twice argued : 1. The question, if a contingent remainder to said six grandchildren of the testator, or if a vested remainder in them as purchasers, on an agreed state of facts, with two facts found by the jury in the case ; one, the seizin of the demandants within thirty years before the test of the writ ; the other, that the survivor of Mrs. Hovey's four children died seized, June 30, 1774. Her said four children all died without issue, and as each died, its share survived to the survivors of said six grandchildren, devisees of said vested remainder. Mrs. Sawyer had three sons born

CH. 135. after said estate in tail in said Abraham ended ; held, this
 Art. 5. vested remainder did not open to let them in,—she died in
 1808. The second argument was on the question, if her children were *estopped* or barred by the warranty of her and her husband, which was thus ; Mrs. Hovey's surviving son left a widow, afterwards Mrs. Rogers, and thinking he was seized in fee, devised his estate to her, supposed to be a moiety ; hence, Rogers and wife supposed they had in her right a moiety in fee, and Sawyer and wife in her right, the other moiety of the lands demanded and other lands. April 22, 1788, all supposing their titles were so in fact, made partition in fee, and Sawyer and wife, in consideration of £200 paid them by Rogers and wife, did "bargain, remise, sell, release, and forever quit-claim" to them their heirs and assigns, "all our right, title, interest, claim, property, and demand" in two pieces of land in Ipswich (both twenty-five acres, demanded premises) "to have and to hold the said bargained and remised premises" &c. ; "and we the said Samuel and Elizabeth Sawyer for ourselves, our heirs, executors, and administrators, do covenant, promise, and engage to and with the said Daniel and Mary (Rogers,) that we will warrant, secure, and defend the said premises to them, the said Daniel and Mary, their heirs and assigns, against the lawful claims and demands of any person or persons claiming from, by, or under us or our heirs." Was a like deed of the other lands, with like warranty from Rogers and wife to Sawyer and wife.

Both questions were argued very much at large. The first, if a contingent remainder on the will itself, and the reasons for the remainder being to said grandchildren of the testator as purchasers and vested,—were in the will : 1. As he gave nothing to the mothers in the remainder, their children never could take it by descent, but must take as purchasers if at all, and then legal heirs must mean children, a present vested interest expectant only as to possession on the preceding vested estate &c. 2 Bl. Com. 242 ; Watkins, 157 ; 1 D. & E. 630, Doe v. Quarley ; 2 Fearn, 125 : 2. Meant a present vested interest, so is the devise, as the gift is in *presenti* ;—devised to no others ; and if contingent, it vested in the testator's heirs at law, as a reversion descended till the contingencies happened, and forever, if these happened not in proper time, that is in the very persons, his daughters, he clearly meant as appears in his will to exclude from any share in the reversion or remainder in fee ; 2 Saund. 382, Purefoy v. Rogers : 3. If a contingent remainder, the testator's widow and son any time might have destroyed it. Authorities on the point relied on were Purefoy v. Rogers, Hopkins v. Hopkins ; and 2 Bl. Com. 168. Word *heirs* may well be words of purchase,

Doe v. Morgan, Lod-
 dington v.
 E. v. Chal-
 loner v. Bow-
 yer, Boras-
 ton's case.—
 Salk. 230.—
 1 Lev. 69.—
 Co. 188.

so legal heirs. 3 Salk. 292 ; 1 Mod. 159, 226 ; Archer's Ch. 135.
 , 1 Co. 66, 67 ; Co. L. 3 ; 4 Bac. Abr. 303 ; Powell Art. 5.
 Devises, 346 to 349 ; also, Long v. Laming, Allen v. Pal-
 , Doe v. Quartley, Long v. Beaumont, Burchell v. Dur-
 t, Goodright v. White, Doe v. Ironmonger, &c. before
 d. Court never construes a remainder contingent where
 an be taken for vested. Ives v. Legg, and 2 Fearne, 222 ;
 v. Collis. A remainder in fee may be a present vested
 rest on an estate in tail. 2 Fearne, 124, 125 ; Salk. 232 ;
 well on Dev. 235 ; and also, Baldwin v. Carver, Badger
 Lloyd. Estate opening to let in after-born children, Doe
 Perryn. The six grandchildren took a joint estate as joint-
 ants and joint-purchasers, opening to let in those born be-
 e the remainder vested in possession, and so the devise of
 rs. Hovey's surviving son was void. 2 Bl. Com. 186 ; 3
 ast, 533 ; Powell on Devises, 175.

Second question, if the demandants were rebutted by said
 arranty of their parents, Samuel and Elizabeth Sawyer : 1.
 his was the husband's warranty, (Colcord v. Swan & ux.,
 ited above,) wife estopped only as she conveyed her estate,—
 nd Wootton v. Hele : 2. Was Samuel Sawyer's collateral
 covenant or warranty ; as the demandants could never claim
 he lands through him, a stranger in blood to Sylvanus Lake-
 nan, under whose will they claim : 3. A rebutter is odious in
 law, it admits the demandants have a right to recover but for
 this matter of *estoppel* : 4. Sawyer and wife meant only to
 convey their right, not the lands themselves, or the estate of
 the demandants in them, so their deed ; 2 Bl. Com. 301, 302 ;
 Co. L. 288 : 5. Said warranty is only against those claiming
 under Sawyer and wife and their heirs ; but the demandants
 claim not under them, but under Lakeman's will ; 2 Bos. &
 P. 12, 28, Browning v. Wright : 6. Neither grantors nor gran-
 tees had any freehold estate in the land when the warranty
 was created by title or disseizin ; as the demandants then had
 the title and seizin, as the verdict finds in substance : 7. If
 Sawyer and wife, or Rogers and wife, had a freehold estate
 or fee at the delivery of the deed and warranty created, it
 was by disseizin made at the moment this was done ; so a
 warranty commenced by disseizin, and void at common law ;
 Co. L. 366 ; 5 Co. 80 ; Cro. Car. 483 ; 5 Bac. Abr. 441 ;
 10 Co. 96 : 8. *Quere*, if void by 3 & 4 of Anne : 9. Estate
 of the demandants was not divested when the warranty was
 created &c. ; so not affected by it, because if not divested
 and turned to a right it did not attach, but was void ; 10 Co.
 96, 97, Seymour's case ; 3 Co. 59 ; neither party to the
 deed had a right of entry ; the estate of the demandants was
 only divested and turned to a right by the actual entry of

CH. 135. Rogers and wife after their deed was executed, and so after the warranty in it was created, and their entry could never by fiction relate back to work a disseizin : 10. Not a case within the doctrine of rebutter, as that is only to prevent a circuity of action.

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See Ch. 114, a. 8, s. 9.—
2 Cruise, 281, 282. &c.—
Fearne, 372, Woodliff v. Drury.—Ch. 114, a. 8, s. 11.—Fearne, 276.

§ 15. *Two contingent estates in fee may be limited in the alternative.* On general principles, as already stated, no remainder can be limited after a limitation in fee, as that leaves nothing to be limited. Yet two or more several contingent estates in fee, may be limited as *substitutes* or *alternatives*, where one ends, another to begin, and one never to interfere with another, and must be so limited, that only one can take effect, and every after limitation be a disposition, substituted in the room of the former, if that fail of effect. There are many cases in the books of this description ; as Plunkett v. Holmes, stated a. 2, s. 12 ; Loddington v. Kime, stated Ch. 125, a. 5, s. 9 ; Doe v. Elvey, a. 4, s. 6 ; Doe v. Holmes, a. 5, s. 5 ; Goodright v. Dunham, Ch. 125, a. 5, s. 26 ; Doe v. Perryu, Ch. 130, a. 2, s. 16, &c. &c. ; Wilcock v. Hammond, Ch. 111, a. 5, s. 1 ; Ch. 128, a. 2, s. 5 ; Fearne, 270 &c. ; 2 Cruise, 316 ; Ch. 114, a. 8, s. 11, shifting uses.

Fearne, Philad. ed. of 1819, p. 226, cites 1 Salk. 224, Lord Raym. 208, and the cases, s. 16, except Doe v. Elvey.

3 Atk. 771, Tracy v. Lethulier, cited by Fearne, 226 &c.—See s. 41, this Art.

§ 16. *But no estate after a remainder in fee can be vested.* That is, where there is a contingent limitation in fee absolute, no estate limited after can vest, except after a contingent determinable fee. As in Loddington v. Kime, there was a contingent fee to Armyn's issue, hence the two after remainders to Style and to Barnardiston were contingent. Except a contingent determinable fee, devised in trust for some special purposes only, will not prevent a subsequent limitation to one *in esse*, from being vested. As where A devised all his estates to B, his daughter, for life, remainder to trustees to preserve &c. remainder to her first and other sons in tail, and if she died without issue of her body living at her death, then he devised his estates to trustees and their heirs till his cousin H. N. should attain his age of twenty-one years, and then he devised to him after twenty-one for life, remainder to his first and other sons in tail male ; and in default of issue, or if he died before twenty-one, and without issue, then to S. L. for life. Held, that the contingency of the daughter's dying without issue living at her death, affected only the estate limited to trustees, until H. N. should attain twenty-one : that this limitation to trustees was not an *absolute fee*, but a *determinable fee* ; that the estate to H. N. was only contingent until he attained twenty-one, and that this contingency extended to none of the subsequent estates ; hence the remainders over to persons *in esse* were vested. Nor will a power of appointment suspend the subsequent limitations.

§ 17. *Where a contingency annexed to a preceding estate, is a condition precedent or not*, to give effect to ulterior limitations. These are of three descriptions: 1. Limitations after a preceding estate which is made to depend on a contingency that never takes place, as in *Tracy v. Lethulier* above, and *Napper v. Saunders*, in which cases, held, the contingency affected only the estate to which it was first annexed, without extending to ulterior estates.

Description 2d. Limitations over upon a conditional contingent determination of the preceding estate, where such preceding estate never takes effect at all. As *Scatterwood v. Edge*. A devise to trustees for eleven years, remainder to the first and other sons of A successively, in tail male, provided they took the testator's surname, and if they or their heirs refused so to do, or died without issue, then he devised his land to the first son of B, in tail male, provided he took his surname; and if he refused, or died without issue, then to the testator's right heirs. A died without having had any son. B had a son at the time of the devise. Held, that the subsequent limitation to B's first son, then *in esse*, and capable, took effect, and that the preceding limitation to A's first son, or the condition thereto annexed, did not operate as a *preceding* condition, which *must* happen to give effect to the subsequent limitation to the son of B, but was only a precedent estate, attended with such a limitation. 1 Vesey, 422.

Third class. Limitations over upon the determination of a preceding estate, by a contingency which never happens, though such preceding estate takes effect. As where A devised his house &c. to his wife for life, on this condition only, that if she should marry again, then his will was, that the house &c. should go forthwith to his eldest son and his issue, and if all his issue male should die &c. remainder over. Lord Hardwicke held, it was not a *vested* remainder in the son, but a *contingent* limitation, to take effect only if the wife of the testator should marry again, and so was the testator's intention. See *Leechford v. Checke*, *Fearne*, 239; *Gordon v. Adolphus*, Ch. 130, a. 6, s. 3; *Foy v. Hinde*, Ch. 114, a. 31, s. 36; *Doe v. Fonnereau*, Ch. 125, a. 4, s. 3; Ch. 114, a. 18, s. 3; a. 22, s. 18; Ch. 125, a. 5, s. 2. What is not a condition precedent, *Bradford v. Foley*, though the words seem to be so.

§ 18. The estate supporting and the contingent remainder must be created by the same instrument. Therefore, an estate for life given by one deed, will not support a remainder given by another. Nor an estate for life, settled by A on B by deed, enure to support a contingent remainder given by the will of A. A woman being tenant for life, the husband

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2 Cruise, 288,
289, &c.—
Fearne, 233
&c.—Horton
v. Whitaker,
1 D & E. 24.

1 Salk. 229.
—Fearne,
237.—2
Cruise, 293.
—Douglass, 68,
Bradford v.
Foley.

Fearne, 238,
240, Sheffield
v. Ld. Orrery.
—Jordan v.
Holman,
Ambl. 209,
& 1 D. & E.
389, 393.

2 Cruise, 330.
—Raym. 162,
Snow v.
Cutler.

CH. 135. devised the same estate to the heirs of. her body, if they attained fourteen years. Held, this was no remainder, but an executory devise, for though she had the preceding freehold, yet this was a new devise, to take effect after her decease, and not a remainder joined to a particular estate. See the same principles, *Moore v. Parker*, Ch. 129, a. 2, s. 3. And so *Doe v. Fonnereau*, Ch. 114, a. 22, s. 18.

Fearne, 316,
317, &c.

§ 19. *When a contingent remainder must take effect in interest, especially as to several persons.* Must, as before stated, take effect during the particular estate, or at the moment it ends, (though a vested one takes effect after it is defeated) that is, the contingency or event limited must so happen. But the particular estate never ends to this purpose, while the tenant thereof has an actually present right of entry into it; nor so long as it remains unchanged in quantity; nor by his bargain and sale, or lease and release of it. And though his forfeiture generally, or his surrender of it puts an end to it, yet some of his acts, though they give him in remainder a title to enter for the forfeiture, yet do not destroy the contingent remainder, unless some subsequent vested remainder-man takes advantage of the forfeiture. So the particular estate may end by *merger*, as stated a. 4, s. 3. So by the feoffment of the tenant of it, as *Archer's case*, stated Ch. 125, a. 5, s. 8; so as in *Purefoy v. Rogers*, stated Ch. 114, a. 19, s. 7, by *feoffment* and *merger*.

Fearne, 321,
322,—Co. L.
328.

Fearne, 222,
223.—Co. L.
259.—1 Co.
106.

2 Saund. 386.
—Fearne,
328, 329.

§ 20. But though tenant for life do not discontinue or divest any estate, yet a contingent remainder is gone, if his life estate unite with the inheritance. As if A be tenant for life, remainder to his first and other sons in tail, remainder to B in fee, and A and B join in a fine to C, this is no discontinuance or divesting of any estate, as each gives only his own. Yet the intermediate contingent remainders are destroyed, by the union of the particular estate with the remainder in the grantee; after which no distinct particular estate exists to support the contingent remainder. See *Purefoy v. Rogers*; *Mansel v. Mansel*, 2 Cruise, 383, 416, and other cases.

2 Cruise, 348,
350.

Comb. 487.
—Co. Lit. 9.
—Fearne,
312, 313.—
5 Co. 8.—13
Co. 37. *Doe*
v. Martin.

§ 21. *Several persons* to whom a contingent remainder is limited, may vest as to some and not all,—according as some may come *in esse*, before the determination of the particular estate, and others not. As a limitation to A for life, remainder to the right heirs of B and C, here if B happen to die before A, and C to survive A, the heirs of B may take, but not those of C, for B's heirs are *in esse* at the determination of the preceding estate, but not the heirs of C, who is then living. This doctrine is confined, as seems, to limitations at common law, and is not extended to estates created by way of devise. As in *Doe v. Perry*, where the estate opened &c.;

Matthews v. Temple, 1 Ld. Raym. 311; *Oates v. Jackson*, Ch. 135. Ch. 134, a. 3, s. 29.

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§ 22. *Preceding estate in several persons*; on which a contingent remainder may fail as to one part, and take effect as to another, whenever the preceding estate is in several persons in common, or in severalty; for the particular tenant of one part may die before the contingency, and the particular tenant of another part may survive. As fully stated, *Lane v. Pannel*, cited in part, 2 Cruise, 341; *Fearne*, 38, 63, 310, &c. The particular estate must exist, or a right of entry &c. when the contingency happens, and if not, the remainder fails, though the particular estate be afterwards restored.

2 Cruise, 340
—*Fearne*,
310, 312.

Ch. 114, a.
23, s. 1.—
Ch. 114, a.
24, s. 11.

§ 23. *What changes a contingent into a vested remainder in interest.* A lease is to A for life, and after J. D's death, remainder to B in tail, as this cannot take effect living J. D. in possession, though it fall by A's death, J. D. survives him, it is so far a contingent remainder in B. But if J. D. chance to die before A's life estate ends, then B's remainder thereby becomes capable of taking effect in possession, when it shall happen to fall, and there is the same estate as if it had been originally limited without any regard to J. D's death. This material alteration in the nature of B's remainder, occasioned by J. D's timely death, is the change of a *contingent* into a *vested* estate;—at first contingent, because doubtful if J. D. would not live longer than A's estate would continue, and so doubtful if another estate would not come between A's particular estate and B's remainder; then it vested in interest, because when J. D. died, living A, his particular estate, and B's remainder came together, the uncertainty being removed,—and B's remainder became capable of vesting in interest and in possession, the moment A's life estate determined, but till that did end, B's remainder could not vest in possession, but only in interest, and as B might die without issue, living A till his death, it remained uncertain if B's remainder ever would vest in possession.

Fearne, 216,
217.

§ 24. *Fearne's rules for distinguishing contingent from vested remainders.* That is, "wherever the preceding estate is limited, so as to determine on an event that certainly must happen; and the remainder is limited to a person *in esse*, and *ascertained*, that the preceding estate may, by any means, determine before the expiration of the estate limited in remainder; such remainder is vested. On the contrary, wherever the preceding estate (except in the instances before noticed, as exceptions to the descriptions of a contingent remainder) is limited, so as to determine only on an event uncertain, and may never happen; or wherever the remainder is limited to a person *not in esse*, or *not ascertained*; or wherever limited so

Fearne, 217
to 222.

See a. 1, s. 2,
a. 6, s. 6.

CH. 135. as to require the concurrence of some dubious uncertain event,
 Art. 5. independent of the determination of the preceding estate, and
 ~~~~~ duration of the estate limited in remainder, to give it a capacity of taking effect, then the remainder is contingent." On these principles, if there be a lease to A for life, remainder to B during the life of A, B's remainder is a vested interest, though it may never vest in possession, for A's death is a certain event, hence his estate must end. B is a person in being, and A's estate may end by forfeiture or surrender, and so before his death, and leave for the residue of his life a remainder to B. Yet this may never vest in B in possession, as he may die first. The cases are not uniform on this point. "And it is that sort of interest which the trustees have for preserving contingent uses." See *Bromfield v. Crowder*, Ch. 125, a. 7, s. 15; and sundry cases there cited. Where an estate vests subject to be defeated on a condition subsequent, see next article.

Fearn, 247.—  
 Hanson v  
 Graham, 6  
 Vesey, jun.  
 239.—3 Lev.  
 132.

§ 25. *A condition appearing to be precedent held to be one subsequent*, so the estate vests immediately, subject to be defeated by an after condition when it happens. See *Bromfield v. Crowder & al.* *Stocker v. Edwards*. All which, and other cases to the point, were noticed in said late case of *Bromfield &c.* 1 New R. 313 to 327, and stated, Ch. 125, a. 7, s. 15; cited *Boraston's case*, Ch. 43, a. 1, s. 6, and cases there cited; *Goodtitle v. Whitby*, id.; *Edwards v. Hammond*, cited Ch. 125, a. 7, s. 15; *Acherley v. Vernon*, Willes, 153; *Pawsey v. Lowdall*, Sty. 249, 273; *Mildmay v. Hungerford*, 2 Vern. 243; *Doe v. Lea*, cited Ch. 114, a. 22, s. 7; *Brownsword v. Edwards*, cited Ch. 114, a. 22, s. 20; if he attain twenty, a condition precedent, *Denn v. Bagshaw*, 6 D. & E. 612; so "if living at the time of her death," such condition, *Lane v. Pannel*, s. 22; *Habersham v. Vincent* Ch. 114, a. 24, s. 9; Ch. 127, a. 1, s. 14; *Chapman v. Blisset*, s. 16, and 1 Cruise, 463.

Fearne, 325,  
 336.—  
 Fearne, 331.  
 —Fearne,  
 357.

§ 26. *Trustees for preserving contingent remainders* introduced, because the preceding tenant of the freehold has power to destroy them, by destroying or materially changing his own estate by forfeiture, surrender, or otherwise, in his lifetime. "The legal estate thus limited to the trustees, during the life of tenant for life, is a good remainder vested in them; under which they will have such right of entry in case of a forfeiture, or *tortious* alienation of the tenant for life, as will support the contingent remainders expectant on his decease." If such trustees join in a conveyance to destroy such contingent remainders, equity views it as a breach of trust. Under certain circumstances equity has directed trustees to concur in destroying them. A devise to trustees and their heirs, and

to the survivor and his heirs, gives a fee to the trustees &c. CH. 135.  
 And so it may if heirs be not added to trustees; if so, the in- Art. 5.  
 tent &c. See *Trusts*, Newhall v. Wheeler, Ch. 114, a. 17,  
 s. 4; 2 Cruise, 381, 386.

§ 27. The alteration in the particular estate that destroys contingent remainders must amount to an alteration in the *quantity* and not in the *quality*; relies on *Lane v. Pannel*, stated, Ch. 114, a. 23, s. 1; also, on *Harrison v. Belsey*, Raym. 413. In this case, lands were settled to the use of P and S, his daughters, for their lives, remainder to the use of the first, and other sons of S in tail, remainder to her daughters, remainder to the heirs of P; S afterwards, and before a son was born, by deed released all her right and estate to the use of P and his heirs. Held, that this release from one joint-tenant to another for life, did not destroy the contingent remainder to the first son of S. For while the "particular estate continues the same in *quantity*, it continues to be the same estate as far as respects its relation to the remainder," clearly a *vested* one,—and why not as to a *contingent* one? This material alteration takes place in the particular estate, when it *merges* in the reversion &c. As in *Purefoy and Rogers*, 2 Saunders, 386. See *Merger*, Ch. 114, a. 28, sundry principles and cases. But the descent of the fee on tenants for life, does not destroy the contingent remainder, when the inheritance descends immediately from the person, by whose will the particular estate and contingent remainders are limited; here is no merger, as a merger would, in such case, be inconsistent with the testator's intention. See *Plunket v. Holmes*, *Archer's case*; *Wood v. Ingersol*, a. 4, s. 3; *Fortescu v. Abbot*, a. 2, s. 12, 13; *Hooker v. Hooker*, a. 2, s. 15; *Hartpool v. Kent*, a. 2, s. 14. But if the inheritance descends, or comes from one not the deviser &c. of the particular estate, to him who has it, it merges. So if by conveyance or accident, generally, it so comes, as then there is no inconsistency in the merger, as there is in supposing the will or deed creates distinct estates; and yet so as one merges in and is destroyed by another therein directly or indirectly created. If tenant for life make a feoffment in fee on condition, and before it is broken the contingency happens, the contingent remainder is destroyed forever; though tenant for life afterwards enters for condition broken, and revives his estate; *secus* if he enters *before* it happens, for by reentry he is tenant for life again, till entered upon by the lessor for the forfeiture arising from the feoffment.

§ 28. If A limit the remainder of inheritance in contingency, by way of use or devise, the inheritance remains in him and his heirs till the contingency happens to take it out of

*Fearne*, 388,  
 &c. see art. 2,  
 s. 14, 15, 16.  
 —2 Cruise,  
 360, 361.

Ch. 114, a. 19,  
 s. 7, especial-  
 ly s. 12; see  
*Boothby v.*  
*Vernon*, Ch.  
 130, a. 3. s.  
 19.

*Fearne*,  
 341, 345.—2  
*Salk* 577.—  
*Fearne*, 349,  
 350; see a. 1,  
 17.—2 Cruise  
 344, 360 to  
 366.

*Fearne*, 351,  
 359, to 366.—  
 2 Cruise, 441,  
 449.

CH. 135. *him. Plunkett v. Holmes; Purefoy v. Rogers; Sawyer v. Rogers, &c.* So in conveyances at common law, the remainder of the inheritance granted on a contingency, remains in the grantor and his heirs till it happens.

§ 29. *Remainder-man, his power, &c.*—may claim under a deed, to which he is not a party, 4 Cruise, 12; redeeming a mortgage, he, in England, pays two-thirds, 2 Cruise, 118; not bound by the acts of tenant in tail, 1 Cruise, 41, a. 5, 4 Cruise, 119; cannot enter for condition broken, 2 Cruise, 51.

§ 30. An estate tail after possibility &c. may be had in remainder, 1 Cruise, 99; it may be held in joint-tenancy, 2 Cruise, 499; a rent may be granted out of it, 3 Cruise, 343; may be created by feoffment, 4 Cruise, 108; is void after a devise to a man and his heirs, 6 Cruise, 277; on estate tail may vest at any time, 4 Cruise, 503; barred by warranty, 4 Cruise, 61.

ART. 6. *Powers and authority. General principles.*

Those powers, usually given to attorneys, agents, factors, &c. have been considered generally, in former chapters, and will be in this article noticed but in a few cases, and those mainly in relation to estates. The powers to be considered in this article are those, usually given by deeds and wills, to create, convey, modify, and revoke estates, whether existing at common law, or on the statute of uses.

These powers more especially relate to all conveyances, which derive their force and effect from that statute; and when relating to land, are appendant and powers in gross, as hereinafter explained; also, powers collateral to lands.

So powers and authority relating to estates are intimately connected with the several species of estates, generally created by the acts of the parties. It is, therefore, proper to notice the essential principles here, that govern in executing and construing these powers. 1 D. & E. 432.

§ 1. Where a man has an authority, and no interest in the estate, and does an act in his own name; it shall be intended to be done in virtue of his authority. But where he has an authority and interest both, and does an act relating to the estate in which he has an interest, not reciting his authority, it is intended to be done in virtue of his interest. Or where he cannot by law bind himself, it is intended he acts under his power, though he do not say so. 6 Co. 18.

§ 2. One having a power, may act in the name of himself, or of his principal; though most regular in the latter way. But Stra. 765, a deed must be in the principal's name. 2 East, 142; Cro. El. 878.

§ 3. A power to one to sell and convey all the principal's lands and goods, is a valid authority. And the rule that a power must be pursued, means only in substance.

2 Stra. 962.—  
Doug. 566.  
—Cowp. 26.  
—3 Burr. 441.  
—1 W. Bl.  
446.—1 Wils.  
224.

Salk. 96.—3  
Salk. 124.—2  
East, 142.—2  
Bos. & P. 567.  
—5 East, 148.  
—4 Cruise,  
228.

Salk. 96, Par-  
ker v. Kett.—  
Hob. 160.

Salk. 96.—  
Fearn's Ex.  
Devises, 348.

§ 4. "A naked trust or authority cannot survive, but a trust, coupled with an interest shall survive together with" the interest or estate; and a "bare authority cannot be released; therefore the *executors* to whom one devises to sell his lands cannot release to the heir." When an attorney does less &c. 3 Day's Ca. 385, 388.

§ 5. A power of attorney is revocable in its nature, except to recover an interest &c. as s. 21.

§ 6. A power to two jointly, as a letter to make livery of seizin, one alone cannot execute it; but otherwise if joint or several. And a power to *three*, jointly and severally, two cannot execute it, but it must be executed by the three or by one.

§ 7. A power to raise legacies out the profits of leasehold lands, is a power to sell; but a devise of the *annual* profits gives no power to sell; but a devise of the profits does. Executors empowered to sell lands, may do it in their own names.

§ 8. Wherever a power is coupled with an interest, it may be assigned; as to A and his assigns, to cut down trees. And such a power survives, though a naked power does not.

§ 9. "Where there is a complete execution of a power, and something is, *ex abundante*, added, which is not warranted, *thereby*, if the excess be distinguishable, so that the court can draw the boundary, the execution will be good, and *only the excess* void. But when the boundaries between the excess and the execution are *not* distinguishable, the execution will be void for the whole." A power to lease lands for twenty-one years,—a lease for forty years is good for twenty-one; and a power to lease for twenty years, a lease for ten is good. 2 Bos. & P. 35; 4 Ves. jun. 631.

§ 10. There is a general power of appointment. This enables the grantee of the power to appoint the estate to *any persons* he thinks proper, *having a capacity to take under the power*.

§ 11. A particular power restrains to *particular objects*, or *persons*. General powers are two-fold: 1. Reserved by the owner of the estate, retaining at the same time his original ownership, by a *resulting use*, or *express limitation* of the fee to himself: 2. Reserved by him on alienating the estate for a good consideration, as marriage &c., or to a stranger in consideration of money;—but the instrument must refer to the estate. 4 Cruise, 250.

§ 12. The uses declared in the execution of the power must be such, as would have been good, if limited by the original deed; and if such uses, if limited by that, would have been void, as too remote, they will be so, though declared by the instrument, whereby the power is exercised. Hence,

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Co. L. 181,  
265. May be  
devised, 6  
Cruise, 22,  
see Index.—4  
Cruise, 230.  
Farr. R. 95.

5 Co. 91,  
Hoe's case.—  
3 Salk. 276,  
277.

3 Salk. 187.  
—Roll. Abr.  
33.

6 Com. D. 1.  
—Willes,  
105.

Combes'  
case, 9 Co. 76.  
—2 Wood's  
Con. 34, 36.

1 Lev. 148.  
—Cowp. 651,  
657.—2 East,  
385.—6 Com.  
D. 7.—Ambler,  
740.—4  
Wood's Con.  
488, 489.—4  
Cruise, 268.

Fearne's Ex.  
Devises, power  
need not  
be recited.

4 Cruise, 257.  
—Hob. 160.

—Cro. J. 31.

—Cro. El.  
877.

Fearne's Ex.  
Devises, 348.  
349.—See s.  
46.

CH. 135. such use to an *unborn child* of an *unborn child*, as a *purchaser*, is void, for it would have been so in the original conveyance, as tending to a *perpetuity*,—to tying up the property beyond a life in being, and twenty-one years, and time of pregnancy after.

1 Burr. 60,  
120.—  
Ferne's Ex.  
Devises, 352,  
Taylor v.  
Horde.

§ 13. Lord Mansfield and the court held, that "all powers must be executed according to their meaning." A power to allot to particular objects, cannot be to others; and, 355, power cannot be delegated. But A may give power to B to give or *make* the power,—and making is not delegating power. By Ferne, *quære* as to this last rule.

4 Wood's  
Con. 488.—  
Co. L. 49, 52.  
—5 Co. 94,  
95.—Perk.  
s. 187, 189.

§ 14. If a lease of lands be made to A and B for years, and remainder to C in fee, and livery is made to A alone, it is a good livery to vest C's remainder; for A and B have an interest in the lands, by the lease before entry, as well as an authority to receive livery for C; but otherwise, as to all who have but a bare authority. A power cannot be delegated but by special words. 4 Cruise, 273, 274.

5 Wood's  
Con. 15.—2  
P. W. 626.

§ 15. One executor or administrator may give or sell any of the goods of the deceased. But two executors empowered to assent to a marriage, the surviving one cannot; it is a bare authority not coupled with the interest.

4 Woods  
Con. 487,  
489.

§ 16. If attornies have power to make livery to A, and they make it to A and B, it is void as to B, and good as to A, for they execute their power, and more, and the excess is distinguishable.

4 Wood's  
Con. 487.

§ 17. Letter of attorney to A to make livery of seizin of black-acre and white-acre, and he makes it only of one; this is void, for he does less than he is authorized to do, and does not fulfil the intention of his constituent. He must execute all his power.

Lotfit, 216.

§ 18. An authority given by law must be strictly executed.

§ 19. Expression of what the law implies in executing a power, will not prejudice, though not expressed in the deed giving the powers, as implied powers are understood.

1 W. Bl. 281,  
Woolston v.  
Woolston;  
same case,  
2 Burr. 1136.  
—4 Cruise,  
260.—2 Burr.  
704.

§ 20. Powers how executed at different times. As to make a life estate to B's wife, may be so executed, if not confined to one entire thing, as a jointure &c.; or limited by some provision. *Construction of powers.* Naked powers must be construed strictly, and powers coupled with property, if merely legal, are construed in a manner as strictly in equity as at law. Also powers under the statute of uses are to be construed as liberally at law as in equity. The construction of powers was brought from equity to the common law by the statute of uses. So executed on different parts of the estate. See s. 33.

§ 21. *Powers when revocable or not.* A power of attorney executed for a valuable consideration cannot be revoked, nor can it be to receive an interest &c. or to confess a judgment, as when it conveys a right that cannot be recalled. But generally a power is revocable in its nature. An appointment may, in some cases, operate as a *revocation pro tanto*, as a mortgage, &c. *Secus*, if there be a complete disposition of the equity of redemption also; there the revocation is complete of the power. In modern settlements the powers of revocation, sale, and exchange, are usually reserved to the trustees. Where a power is only to revoke, no new uses can be appointed or declared. How by will sealed,—must be sealed.

§ 22. *Power how to be executed.* A common-law power to appoint by deed, executed in the presence of two witnesses, cannot be executed by will; but may be, if the power be to appoint by any writing or instrument, or given in other general terms. See *Pugh & ux. v. Leeds*, Ch. 27, a. 5; *Kebbett v. Lee*, Hob. 312; *Roscommon v. Fowke*, 6 Bro. Parl. Ca. 158. Whenever to be executed by deed, will, or writing, the instrument must be effectual in law, as a will executed legally &c., except when no estate passes from him giving the power. And a will made in execution of a power, retains all its properties as a will, and must be construed on the principles on which wills are revocable.

§ 23. *A parol power.* A man by *parol* may authorize another to endorse his name on a bill of exchange or note; then the rule *facit per alium* &c. applies; so where one empowers his servant to buy &c.

§ 24. *Where interest is implied &c.* A power given to charge lands with a sum of money, interest on it is implied. For money so charged of course carries interest. And *Boycott v. Cotton*; *Lewis v. Freke*, 2 Ves. jun. 507.

§ 25. *A power to vary the estate or not.* A power to grant a life estate is not well executed by a lease for ninety-nine years, determinable on a life; yet the execution may give a lesser estate than the power authorizes. And 2 Burr. 1147. And in *Rattle v. Popham*, the Lord Chancellor held the execution good. *Quære*, for the wife might have lived more than ninety-nine years, and the lease for years was a very different kind of estate. Power to appoint a real estate is well executed by devising to trustees to sell, and appointing the monies to arise from the sale; but it must not be illusory.

§ 26. *A public power to several.* They all meet to execute it, the act of the majority binds the minority. As where six triers of leather were appointed and met, and four condemned it, held, the condemnation of all six, though the other two dissented. See 8 East, 319, *Battye v. Gresley & al.*

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7 Ves. jun.  
28.—1 Cain.  
Ex. 16.—Farr.  
93.—1 Vern.  
97, *Perkins v. Walker*—6  
Bro. Parl.  
Ca. 295.—  
4 Cruise, 381.  
—Stra. 584.  
—4 Cruise,  
251, *Dormer v. Thurland*.  
Cowp. 260,  
*Darlington v. Pulteney*.—  
4 Cruise, 253,  
—6 Cruise,  
69.—2 P. W.  
258.—2 Ves.  
365, *Jones v. Clough*—  
2 Bro. R. 319

12 Mod. 564.  
—See also  
*Needham v. Gorham*.

2 Salk. 538,  
*Kilmurry v. Geery*.—1  
Atk. 552.

2 Stra. 992,  
*Rattle v. Popham*.—  
4 Cruise, 262.

6 Ves. jun.  
792.

1 Wils. 224.  
—Bro. Ch.  
Ca. 450.

1 Bos. & P.  
229, *Grindley v. Barker*.  
—3 D. & E.  
692, *Green v. Miller*.

Ch. 135. cited Ch. 217, a. 3, s. 11. How men, to execute a public power, must meet &c. 9 East, 246; 1 Johns. R. 500; 8 D. & E. 454; 6 Johns. R. 39, cited 1 Bos. & P. 242, in a note; Cook v. Loveland, 2 Bos. & P. 31. A majority to correct baking may act. But all referees must sign, if not otherwise provided.

2 D. & E.  
721, Doe v.  
Milborne.

3 Maule &  
Selw. 512.

4 D. & E.  
341, Doe v.  
Cavendish.—  
4 Cruise, 270,  
271.

2 Wils. 369,  
Goodtitle v.  
Weal & al.—  
2 Wils. 326.

1 Binn. 546.  
—2 Dallas,  
223—4  
Cruise, 241.

Dougl. 292,  
Renn v.  
Bulkeley.—  
4 Cruise, 257,  
259.

1 Bos. & P.  
192, Goodill  
v. Brigham.

2 D. & E.  
241, Robin-  
son v. Hard-  
castle.—2 H.

§ 27. A power to an executrix to raise a portion for a younger child, does not extend to real estate whereof she is only trustee; and a power to raise portions may be executed at several times, if the first be not meant as a complete execution, and the party in all do not exceed his power. A deed and power are badly executed when the witnesses do not attest the signing.

§ 28. *When a power extends to grand-children or not.* A power to appoint to children. In some cases, children may be extended to grand-children and great grand-children, (cited Wyth v. Blackman, 1 Ves. 196,) where it appears to be the intention of him giving the power, and as there is no rule of law against it, said the court; that also as all the objects of the appointment were in existence when the power was created. Cruise thinks Robinson v. Hardcastle, cited s. 32, and Griffith v. Harrison, cited Ch. 175, s. 22, Ch. 120, a. 1, *contra*. But a power under a marriage settlement to appoint to the children of the marriage, is strictly confined to those children. And if to children in shares &c., and there is but one child, that has the whole estate. 2 Ves. 640.

§ 29. *When a surviving executor &c. has power to act.* May when he has power to sell lands devised to be sold, and no one is named to sell. A power to A and his executors to sell, may be executed by the executor of the executor. 1 Bin. 546, Smith's lessee v. Folwell.

§ 30. *Construction of powers.* See s. 20. Are to be construed on the same principles in a court of law as in a court of equity. 1 W. Bl. 288, in Woolston or Gouch v. Woolston. A power need not be recited in the execution, but that must refer to it;—and to the estate. Hob. 160; 6 Co. 17, Clere's case; Cro. J. 31; 10 Co. 143. But in equity need not refer to the power, it is enough the intention appear. Probert v. Morgan, 1 Atk. 441, 559; 4 Cruise, 259; Cowp. 266. Extinguishing powers, s. 45.

§ 31. *A feme covert's power.* A devise to her empowering her to dispose of the estate without her husband's control; held, the power was void, as being inconsistent with the fee simple estate given to her in the first instance; and that she could not convey without a fine. See s. 49.

§ 32. *Execution must refer to the power.* Held, that every execution of a power must have reference to the original in-

H. Bl. 136, Buckland v. Barton.

instrument creating the power, "and whoever claims under the execution, must make title under the power itself." It seems otherwise in equity. A power to appoint by will is not executed by a mere devise of the residue. As a bond to pay money to such person as A by will shall appoint, is not forfeited by not paying a residuary legatee; but otherwise if the right to it had vested in A, then it had gone to her executor.

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§ 33. *The intentions of the parties govern the court in the construction of powers.* This is the general rule. Hence, under the settlement of an estate a power is given to the tenant in possession to let all or any part of the premises, so as the usual rent be reserved; held, he could not let the tithes, because it could not be the intention to let what never had been let.

3 D. & E.  
666, 678,  
Pomeroy v.  
Partington.

When in a will a power to executors to sell the testator's real estate ceases by his intention in giving it; and many cases cited as to the construction of such powers &c.; and the power of a surviving executor to sell or not, see Ch. 29, a. 15, s. 3; Ch. 135, a. 6, s. 40.

6 Johns. R.  
73, 81 —  
Powell on  
Devises, 292  
to 304.

§ 34. How an attorney must convey under his power. See *Fowler v. Shearer*, Ch. 130, a. 4, s. 76; 7 Mass. R. 14, 25. Must sign in the name of the principal. But a wife cannot contract by covenant.

6 D. & E.  
170, *White v.*  
*Cuyler*.

§ 35. Power annexed to an estate by another deed, executed at the same time, though it be not in the same conveyance by which the estate is conveyed, is valid. And a man may give a power by will, which is a naked authority not annexed to any estate. As if he devise to A for life, and afterwards that it shall be at his disposal to any of his children then living; A has but an estate for life, with a naked power to dispose of the estate in the manner directed in the will.

1 Vent. 279.  
—4 Cruise,  
241.—Salk.  
240, *Thom-*  
*linson v.*  
*Dighton*.—  
6 Com. D. 1.

§ 36. *Power to make leases, how construed.* If A have this power generally, it extends to make leases in possession only, not in reversion. Nor a lease to commence *in futuro*. So a power to lease for two or three lives, he cannot lease to one not born. So a power to lease in possession, he cannot lease a part in reversion. Dougl. 565. Power to lease for twenty-one years may lease for fourteen years. A power to a tenant for life to lease beyond his life, and to bind him in remainder or reversion, must be construed strictly, and every circumstance accompanying that power must be strictly complied with; such compliance is a condition precedent. *Doe v. Sandham*, Ch. 117, a. 5, s. 42. The usual restrictions in leasing powers, are, 1. As to the kind of instrument of lease &c.: 2. As to the lands to be let: 3. The time when the lease is to commence: 4. Its duration: 5. The rent directed to be reserved: and, 6. The covenants and clauses directed

2 Cro. 318.—  
6 Com. D. 3.  
—Cowp. 714.  
—3 Salk.  
276.

3 Maule &  
Sel. 382.—4  
Cruise, 294,  
295.—5 D. &  
E. 667.—1  
Burr. 122.—  
Vaugh. 31.—  
1 Ld. Raym.  
267.—Dougl.  
565.—7 D. &  
E. 713.—3  
Burr. 144.—  
1 W. Bl. 1019.

Ch. 135. to be inserted in the leases. 12 Mod. 147 ; 3 D. & E. 665 ;  
 Art. 6. 8 Mod. 249 ; 2 East, 376 ; T. Raym. 132, 247 ; Cro. El.  
 5 ; Cro. J. 318, 349. A lease from the day of the date is  
 not one in reversion. See *Pugh v Leeds*, Ch. 27, a. 5, s. 2 ;  
 6 Bro. Parl. Ca. 145 ; 7 D. & E. 88.

1 Sid. 101.— § 37. *How the husband may lease &c.* If power be given  
 3 Salk. 276. to a woman to make leases, and she marries, a lease made by  
 her and her husband is a good execution of the power.

6 Com. D. 15. § 38. *Party deceased.* No power shall be executed after  
 the party for whose benefit it was made, is dead.

14 Mass. R. § 39. *Pleading a power.* If a man plead a power and an  
 496, *Minot v. Prescott.* act done under it, he must shew the power to be strictly pur-  
 Cro. Car. sued in all circumstances. As if a power be to sell real, on  
 335, *Dike v. Ricks.* the deficiency of personal estate, the deficiency must be  
 proved.

2 Burr. 1027, § 40. Power to executors to sell absolutely freehold estates  
*Lancaster v. Thoruton.* to pay debts &c. is no devise of the estate to them. And  
 Ch 29, a. 15. until they sell, the estate goes to the heir &c., subject to the  
 a. 3. charges even as to rents and profits, if wanted to pay debts.  
 See more on this subject, s. 44, and *Lingard v. Derby*, 1 Bro.  
 R. 311 ; *Powell on Devises*, 292, 304 ; *Dyer*, 129, 177 ;  
 Cro. El. 26, 80, 524 ; Co. L. 113 ; Cro. C. 382.

3 Johns. Cas. § 41. *Powers given by statutes construed strictly &c.* Where  
 107, *Gilbert's case.* a statute grants a special power affecting the property of indi-  
 viduals it must be strictly pursued, and it must appear on the  
 face of the proceedings that the directions of the act have  
 been strictly observed.

4 Cruise, 230, § 42. *Powers collateral to lands &c.*, are those given to  
 231.—Cowp. mere strangers, having no estate or interest in the land. As  
 260, 269, where powers of sale and exchange are given to trustees in a  
*Darlington v. Pulteney.* marriage settlement, they are said to be collateral to the land,  
 being reserved to strangers, and these powers are viewed as  
 bare authorities and so construed strictly. But powers relat-  
 ing to the land appendant or in gross are viewed as a part of  
 the old dominion and are favourably expounded ; power relat-  
 ing to the land is power given to some one having an interest  
 in it over which it is to be exercised. Appendant is where  
 one has an estate in land with a power of revocation and ap-  
 pointment, the exercise of which falls within the compass of  
 his estate, as where a tenant for life has a power of making  
 leases for a certain number of years. In gross, is where one  
 has a like estate and power, the exercise of which falls out of  
 the compass of his estate, yet is annexed in privity to it, and  
 takes effect in the appointee out of an interest vested in the ap-  
 pointor. As where a tenant for life has a power to create an  
 estate to commence after his own is determined ; such as a  
 power to settle a jointure on his wife, or to create a term for

See Sir Ed-  
 ward Clere's  
 case, 6  
 Co. 18.—Co.  
 L. 216.

years to commence in possession after his own death, these are called powers in gross, because the estate of him to whom given will not be affected by the execution of them. CH. 135.  
Art. 6.

§ 43. *What is implied in a power of appointment.* A power of revocation is, but not *e contra*; so it includes a right to reserve a new power; that is, to appoint absolutely or with a new power of revocation and appointment, if this power relate to the land. A, seized in fee in 1684, conveyed to trustees to the use of himself for life, remainder to the use of his son for life, remainder over. In the conveyance a power was given to A to revoke the uses and limit other uses, and also to revoke or alter such new limitations and to declare other uses. In 1687, A, by deed poll reciting his power, revoked those of 1684, and appointed new ones; these he revoked in 1704, and appointed other new ones. Held, in the House of Lords by the concurrence of all the judges, that this last revocation was void and contrary to all precedents, and the power to appoint anew a second time is void in its creation. Stra. 584.—  
1 Ch. Ca.  
242.—1 Eq.  
Ca. Abr. 342,  
Hele v. Bond.  
2 Cruise, 238.

§ 44. *Power of sale of lands &c.* Any words shewing the testator's intentions his lands be sold to pay his debts &c. will operate a power of sale. If executors &c. merely have power to sell, the lands descend &c. and they may enter to sell, and put the heirs &c. out; or if he devise the lands to his executors to sell &c. they vest in them. And if this power of sale do not survive at law it will be enforced in equity, deeming the persons named to sell mere trustees; and it is a rule in equity, that a trust shall never fail of execution for want of a trustee, and if one be wanting the court will execute the office. A devised thus: "my debts and legacies being first deducted, I devise all my estate, real and personal, to J. S." Held in equity, this was a devise to sell to pay debts. And *Bateman v. Bateman*, 1 Atk. 421; see *Lancaster v. Thornton*, s. 40; 4 D. & E. 39 to 70, *Doe v. Martin*. 6 Cruise, 435.  
—Co. L. 118.  
—See s. 38,  
40.—W.  
Jones, 352.—  
Bro Abr.  
Dev. 50.—1  
Caines' Cas.  
in Error, 16.  
Newman v.  
Johnson,  
1 Vern. 45.

§ 45. *Powers how extinguished.* Whenever a power is coupled with an interest or relating to land, appendant or in gross in one having an interest in it, as explained, s. 42; and he by fine or recovery, or release, or conveyance, entirely parts with his interest, he extinguishes his power. So by a complete execution of it. So by bargain and sale. But a power in gross, described, s. 42, is not barred or extinguished by a conveyance, though it may be by a release, nor is a power to lease barred by a charge on the land, not a departing with the whole estate. See s. 30; and especially *Renn v. Bulkeley*. Nor is a power collateral, barred or extinguished by a release or conveyance. A power may be merged, (*Cross v. Hudson*, 3 Bro. R. 30;) and may be forfeited, (*Gilb. Uses*, 146; *Hawk. P. C. c.* 49, s. 26;) and it becomes void of Gouch v.  
Woolston.—  
Co. L. 265.—  
Co. L. 342.—  
4 Cruise, 335,  
337.—Co. L.  
265, 342.—  
4 Cruise, 338.  
—2 Wils.  
336, *Roe v.*  
*Dunt.*

CH. 135. course when there is no object for the execution of it. *Doe v. Denny*, 2 Wils. 337 ; *Mador v. Jackson*, 2 Bro. R. 588.

Art. 5. *¶ 46. Power to one unborn is good at its creation*, but not to the issue of one unborn. See *Brudenel v. Elwes* or *Elwes*. And a power, in fact an interest, must be limited on such principles as the estate is. 4 Cruise, 232, *Beale v. Beale*. May have a portion under a power, s. 12.

See *Coventry v. Coventry*, cited Ch. 164, a. 2, s. 22.—4 Cruise, 231. *¶ 47. A defective execution of a power.* This equity supports where there is a consideration, 4 Cruise, 325 ; or fraud, 329 ; or a complete execution is prevented by accident, *Id.* but does not supply a non-execution, 330. 2 P. W. 122, 253, 488, 623 ; *Parker v. Parker*, Ch. 104, a. 2, s. 22 ; Ch. Cas. 68 ; 2 Vern. 69, *Arundel v. Philpot* ; 7 Ves. jun. 499, *Holmes v. Coghill*.

2 Roll. Abr. 262, *Snape v. Turton*. *¶ 48. Powers are valid without technical words.* It is sufficient the intention be understood. As where one in a deed used these words, "and if the said A. B. shall make any estate in fee simple or fee tail, then the use shall be," &c. but no land named ; held, it should be intended the lands comprised in the deed.

4 Cruise, 235. —2 P. W. 229, *Bayley v. Warburton*. —1 Eq. Cas. Abr. 343. *¶ 49. To whom powers may be given.* May be expressly and specially given to minors, their minority notwithstanding, but not generally. So to married women. Com. R. 494. But if a *feme sole* reserve to herself a power flowing from her interest, and marries, the power ceases ; *secus*, a naked authority may be expressly given to a *feme covert*.

*¶ 50. An unwarranted condition annexed is void.* 4 Cruise. 268.

END OF VOL. IV.













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